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Gentle, C.J. and Bell, J.
26th November, 1947.

Ramakrishna Aiyar Dharmam *v.* Umar Salai Muhammad Sait.
L. P. A. No. 49 of 1947.

Civil Procedure Code (V of 1908), *Order* 41, *rule* 10—*Scope—Applicability to pauper appeals—Order for security for costs—When proper.*

There is no doubt that so far as the Madras High Court is concerned the provisions of Order 41, rule 10 of the Code of Civil Procedure have application to appeals *in forma pauperis.*

Where a pauper appellant is seeking to set aside a considerable number of alienations of trust properties for which the alienees or their purchasers had given full consideration and the alienations took place some 36 years ago and the appellant's predecessors-in-title had unsuccessfully sued before, it is a proper case for ordering security for costs being furnished.

I.L.R. 3 Mad. 66, relied on.

T. S. Vydinatha Aiyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

K.S.

Satyanarayana Rao, J.
28th November, 1947.

Vanniappan Servai *v.* Sinnathayee Ammal.
C. R. P. No. 815 of 1946.

Court-Fees Act (VII of 1870), *section* 7 *(IV-A)—Applicability—Suit for declaration that a will purported to have been executed was not true in fact and at any rate invalid in law—Reliefs if fall under section* 7 *(IV-A) for purposes of court-fee.*

A will is merely a declaration of the intentions of the testator with respect to his property to take effect after his death and is not a "document securing money or property" within the meaning of section 7 *(IV-A)* of the Court-Fees Act. A suit for declaration that a will purported to have been executed was not true in fact and at any rate invalid in la\ is not one for the cancellation of a document securing money or property and the plaintiff is not bound to pay court-fee on the market value of the properties forming the subject-matter of the will. A court-fee of Rs. 100 is sufficient if the jurisdictional value is less than Rs. 10,000 and if it exceeds Rs. 10,000 the court-fee for declaration will be Rs. 500.

K. S. Desikan for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *M. S. Venkatarama Aiyar* for Respondents.

K.S.

Gentle, C.J. and Bell, J.
1st December, 1947.

Nagappa Chettiar *v.* Trojan & Co.
O.S. Appeal No. 23 of 1946.

Limitation Act (IX of 1908), *Articles* 23, 36 *and* 120—*Suit for damages for maliciously presenting a petition in insolvency against the plaintiff resulting in his adjudication—Limitation—Starting point.*

On a petition filed by the defendant on 22nd September, 1937, when already there was pending another petition by another creditor, the plaintiff was adjudicated

insolvent on 5th October, 1937, and the two petitioning creditors were given their costs, both petitions being heard together. At that time the plaintiff believed that he was indebted to the defendant in respect of share transactions. When the Official Assignee investigated the affairs the claim of the defendant was found to be the result of a fraud played on the plaintiff by the defendant, and the claim was therefore denied. Ultimately the claim was tried as a suit which was unsuccessful. That decision was affirmed on appeal and leave to appeal to the Privy Council having been refused the defendant ultimately applied in London for special leave which was also refused. It was not until somewhere about the 19th November, 1943, when the plaintiff finally knew that he was not indebted to the defendant in respect of the transactions. On 24th January, 1944, the plaintiff filed an application for annulment of his insolvency and on 22nd February, 1944, the order of annulment was made after notice to the defendant. Then the plaintiff filed his suit on 21st February, 1945, against the defendant for damages for maliciously and without reasonable and probable cause presenting the petition in insolvency against him, as the result of which he was adjudicated insolvent. On a question of limitation,

Held: Article 23 of the Limitation Act is inappropriate as the word "prosecution" there relates to a case where the criminal law is set in motion. Article 36 would be more appropriate and prescribes two years as the period of limitation. It cannot be said that that period commences from the date of the filing of the petition. Before a cause of action can arise in respect of an order of a competent Court the order must have been set aside. In the present case until the Privy Council rejected the defendant's application for special leave to appeal, the plaintiff could not have applied for annulment of the insolvency. Even if Article 36 could be deemed inappropriate there is always available Article 120 which provides for a period of six years which would amply cover the plaintiff's case. The suit was accordingly in time.

K. Krishnaswami Aiyangar, N. Suryanarayana and *K. Parasurama Aiyar* for Appellant.

M. Murugappa Chettiar for Respondent.

K.S.

Satyanarayana Rao, J. Puzhakkal Kalappan *v.* Kunnath Ammalu Amma.
1st December, 1947. S.A. No. 1670 of 1945 and A.A.A.O. No. 287 of 1945.

Evidence Act (I of 1872), section 108—Scope of—Presumption of death of person not heard of for seven years—Limits.

Section 108 of the Evidence Act enables a Court to draw a presumption that a person is dead at the date of the suit if such person was unheard of for seven years prior to the suit and not prior to any particular transaction. It cannot be presumed under the section that they were dead before the date of the transaction. There is only one presumption and that is that when the suit was instituted the person not heard of for seven years was no longer alive.

I.L.R. 5 Pat. 312 (P.C.), relied on.

D. A. Krishna Variar, K. N. Kumaran and *K. N. Karunakaran* for Appellant.

S. V. Venkatasubramaniam, S. Venkatachala Sastri and *B. Pocker* for Respondents.

K.S.

Happell and Govindarajachari, JJ. Venkoba Rao, *In re.*
2nd December, 1947. Cr. R.C. Nos. 732 and 1333 of 1947.
(Cr. R. P. No. 626 of 1947) and Taken up No. 12 of 1947.

Madras City Police Act (III of 1888), sections 42 and 43—Warrant under section 42—If should state that the person issuing it has reason to believe that the place to be searched was used as a common gaming house—Presumption under section 43 that the place was used as common gaming house—When permissible—Madras Gaming Act (III of 1930), sections 5 and 6.

A warrant issued under section 42 of the Madras City Police Act or section 5 of the Madras Gaming Act is not invalid simply for the reason that it is not stated therein that the authority which has issued the warrant has reason to believe that

the place in question is used as a common gaming house. A.I.R. 1946 Mad. 465, (1938) 2 M.L.J. 266, (1938) 1 M.L.J. 509 and (1935) M.W.N. 228, approved. (1945) M.W.N. (Cr.) 138, disapproved.

In the case of the issue of a warrant under section 42 of the Madras City Police Act or section 5 of the Madras Gaming Act there are really two acts that have to be performed, a judicial act and an official act. The official act is the issue of the warrant itself in due form over the signature of the Magistrate and the judicial act is the satisfying of himself by the Magistrate that there is reason to believe that the place in question is used as a common gaming house. Since no special form for a warrant under section 42 of the City Police Act is prescribed, it no doubt may be presumed that the official act was duly performed ; and if the Magistrate had stated that he had reason to believe that the place in question was used as a common gaming house the judicial act could also be presumed under section 114 of the Evidence Act to have been regularly performed. Where, however, it is not stated, that the Magistrate has reason to believe that the place is used as a common gaming house it cannot be said that the presumption should necessarily be drawn, if the warrant is challenged, that the Magistrate had reason to believe that the place was used as a common gaming house. If the Magistrate has not chosen to state that he has "reason to believe" then the presumption need not be drawn unless evidence is adduced that in fact the warrant was issued on proper information. All that is necessary, if the Magistrate has not stated himself that he had reason to believe that the place was used as a common gaming house, is for the Court to be satisfied that the Magistrate was aware of the serious step he was taking and that he had reason to believe that the information which was given him was true. It will not usually be necessary to require that the material on which the Magistrate acted should be divulged.

Where the evidence shows that the Deputy Commissioner of Police issued such a warrant without himself verifying it and on no other information than the hearsay evidence which the sub-inspector had not verified, it cannot be held that the Deputy Commissioner had reason to believe that the place was used as a common gaming house and accordingly the presumption under section 43 of the City Police Act that the premises were being used as a common gaming house cannot be drawn.

B. T. Sundararajan and *P. Ramanathan* for Petitioner.

P. Chandra Reddi for the Crown Prosecutor on behalf of the Crown.

K.S.

Gentle, C.J. and Rajamannar, J. Thirumal Nadar *v.* Pichai Ammal.
4th December, 1947. L.P.A. No. 2 of 1947.

Benami—Purchase of property by husband in the name of wife—Title to property—Tests of benami or otherwise.

The fact that the consideration for a purchase has been found by the husband is not conclusive against the wife in whose name the property has been purchased. It is only when the purchase is unexplained by other proved or admitted facts that the conclusion should follow that the transaction is benami for the husband. Where on the facts admitted or proved it is found that a mortgage and sale were taken in the name of the wife with the object that the property should belong to her and that it should not be within the reach of her husband (who provided the consideration) as it was feared that he might dissipate it on his concubine, the interest and title to the property must be held to have passed to the wife and it cannot be said to be a nominal transaction.

K. Krishnaswami Aiyangar and *N. Suryanarayana* for Appellant.

S. Panchapakesa Sastri and *T. V. Balasubramania Aiyar* for Respondent.

K.S.

Happell and Govindarajachari, JJ. Bangarraju *v.* Venkatanarasimharaju.
9th December, 1947. A.A.O. No. 623 of 1946.

Arbitration Act (X of 1940), section 47, Proviso—Scope and effect—Arbitration award obtained otherwise than under the Act—When can be treated as compromise of pending suit.

The question whether the decision in *Arumugha* v. *Balasubramaniam*, I.L.R. 1946 Mad. 39, that "notwithstanding the proviso to section 47 of the Arbitration Act, an arbitration award obtained otherwise than under the Act could be regarded as a compromise of a pending suit even though all the parties to the suit were not agreed that it should be so regarded, the only essential being that all the parties should have consented to the reference which led to the award" is correct was referred to a Full Bench.

Ch. Raghava Rao and *S. Venugopal Rao* for Appellants.

V. Parthasarathi for Respondents.

K.S.

Govinda Menon, J. Public Prosecutor, Madras *v.* Ramachandrayya.
9th December, 1947. Cr. Appeal No. 352 of 1947.

Madras Prevention of Adulteration Act (III of 1918), *section* 5 (1) (b)—*Secretary and salesman of co-operative society supplying adulterated milk to member—Nature of transaction—If "sale" or only distribution—Madras Co-operative Societies Act* (*VI of* 1932), *section* 20—*Effect.*

Section 20 of the Madras Co-operative Societies Act is very general and imparts a corporate character to a co-operative society (registered under that Act) which can own property and transact business, quite irrespective of its members. There is no resemblance between such a society and an ordinary club. As in the case of clubs the society does not create any rights in the properties in favour of a member or members. When an article belonging to the co-operative society is transferred to one of its members for a consideration the transaction amounts to a "sale" under section 4 of the Sale of Goods Act. It cannot be said to be a mere distribution by the society to its member.

Accordingly when milk is delivered for a price by a co-operative society to a person who is a member of the society and the milk is found on analysis to contain 12 per cent. of water, there is a "sale" within the meaning of the Madras Prevention of Adulteration Act.

(1938) M.W.N. 317, explained and distinguished.

(1881-1882) 8 Q.B. 373 and (1915) 1 K.B. 119, distinguished.

The Public Prosecutor (*V.L. Ethiraj*) in person.

T. G. Krishnamurthy for Respondents.

K.S.

Govinda Menon, J. Indaji Kasturichand, *In re.*
12th December, 1947. Cr.R.C. No. 641 of 1947.
(Cr.R.P. No. 535 of 1947.)

Madras Entertainment Tax Act (*X of* 1939), *section* 11 *and rule* 41 *of the rules under the Act—Obligation at all reasonable times to produce books and records for inspection of entertainment tax officer—Reasonable time—Test.*

Rule 41 of the Madras Entertainment Tax Act Rules makes it obligatory that the proprietor of a place of entertainment shall at all *reasonable times* on demand by the entertainment tax officer, produce the books and records for inspection. Section 11 of the Act allows the Inspector to enter any place of entertainment while the entertainment is proceeding. Where however the entertainment tax officer went into a cinema alone at 8-30 P.M. when the manager had gone for his meals keeping the accounts under his lock and key, it could not be said to be a *reasonable time* when the officer could demand the production of the books. Where the books on inspection next day are found to be correct there cannot be said to be any contravention of rule 41 of the rules under the Entertainment Tax Act and the proprietor of the cinema will not be guilty of any offence.

A. Bhujanga Rao and *C. S. Govindaswami* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Satyanarayana Rao, J. Narayanan Nayar *v.* Kesava Menon.
4th December, 1947. S.A. No. 862 of 1945.

Malabar law—Lease granted by Karnavan—Lease of forest at very low rent in the guise of a reclamation lease—Junior members of tarwad—Right to question—Remedy—Removal of Karnavan if essential.

A lease by a karnavan comprised 132 acres of forest land and purported to be a reclamation lease for a period of 12 years. It fixed a rent of 5 paras of paddy per year and a renewal fee of Rs. 25. The junior members of the tarwad sued for a declaration that the lease was not binding on them and for possession on the ground that the lease was not really a reclamation lease and the karnavan had no right to grant it. It was contended on behalf of the lessee that the only remedy of the plaintiffs was to remove the karnavan in a properly constituted suit.

Held: The present case was not one where the karnavan purports to grant a lease which is real but the terms of which are improvident when alone a suit for removal of the karnavan will be necessary. As what was attempted by the karnavan in the present case was to invent a cloak (by calling it a reclamation lease) for really parting with valuable forest lands (with 3,000 useful timber trees) for an insignificant rent, it cannot be said that the lease is a real but an improvident one. There is no lease at all and the transaction is not within the powers of the karnavan and a declaration and possession as claimed by the plaintiffs must be granted.

35 M.L.J. 405 and 54 Mad. 239 distinguished.

D. A. Krishna Variar for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S. ——— *Second appeal dismissed. No leave.*

Horwill J. Thirupathaiah *v.* Mangapathi Rao.
5th December, 1947. C.R.P. No. 126 of 1946.

Court-fee—Suit for declaration that suit plot of land was trust property, and that its alienation by the trustee was void and for a consequent injunction restraining the alienee from interfering with possession of plaintiff—If one for two independent declarations for which separate Court-fees have to be paid—Court-fees Act (VII of 1870), *S* 9*—Power to appoint commission.*

In a suit for declaration that the suit plot of land was trust property and that its alienation by the trustee was void and for a consequent injunction restraining the defendants from interfering with the rightful possession of the plaintiffs, *Held*: that two independent declarations were asked for and separate Court-fees will have to be paid, for it would not directly follow that because the property was trust property, it could not be alienated. Trust properties are sometimes lawfully alienated.

It is competent to appoint a commissioner under section 9 of the Court-fees Act even if it is not at the instance of any party. In such a case the only person who can pay the commissioner is the plaintiff himself.

V. Suryanarayana for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S. ——— *Revision petition dismissed.*

Happell and Govindarajachari JJ. National Sewing Thread Co. Ltd. *v.*
9th December, 1947. James Chadwick and Bros. Ltd.
App. No. 630 of 1945.

Passing off—Ingredients of action—Likelihood of deception of purchaser exercising ordinary caution—Necessity.

In a suit by the plaintiffs (whose sewing thread described as "Eagle" brand with its distinctive label had become associated in the Indian Market with the plaintiffs) for passing off against the defendants who on complaint substituted the word "Vulture" for "Eagle",

Held: On the evidence there being no such resemblance in the name and label of the defendants' goods as to render reasonably likely or probable that customers intending to buy the plaintiffs' thread would be so confused and deceived as to mistake the defendants' article for the plaintiffs' the suit must be dismissed.

The Advocate-General (*K. Rajah Ayyar*) and *K. Srinivasan* for Appellant.

O.T.G. Nambiar instructed by Messrs. King and Partridge for Respondent.

K.S. —————— *Appeal allowed.*

Horwill and Bell, J. Ramaswami Chettiar *v.* Ramaswamy Pillai.

10*th December*, 1947. C.C.A. No. 55 of 1946.

Madras City Tenants Protection Act (*III of* 1922)—*Applicability—One of the joint tenants under tenancy created before the commencement of the Act holding over after the Act came into force—If entitled to benefits under the Act.*

The definition of 'tenant' in the Madras City Tenants Protection Act includes a person holding over after the termination of the tenancy. When there are joint tenants before the commencement of the Act and only one of them holds over, the tenant holding over is liable to pay the whole of the rent to the landlord and is not entitled to claim from the tenants who do not hold over any portion of the rent; nor is the landlord entitled to look to any person other than the tenant holding over for the rent. Where only one of the joint tenants under a lease of 14—7—1921 holds over after the expiry of the lease in 1931 he is a tenant entitled to the benefits of the City Tenants Protection Act.

S. Amudachari for Appellant.

M. K. Harihara Aiyar for Respondent.

K.S. —————— *Appeal dismissed.*

Bell, J. Nomiraja Chowta *v.* Dejamma.

12*th December*, 1947. C.R.P. No. 1187 of 1946.

Madras Agriculturists Relief Act (*IV of* 1938, *as amended by Act XV of* 1943), *section* 19-A—*Scope—Declaration of amount due under usufructuary mortgage—Cannot be made on an application under section* 19-A.

Section 19-A of the Madras Agriculturists Relief Act as amended by Madras Act XV of 1943 is not wide enough to permit an agriculturist debtor to come to Court and ask for a declaration under that section of the amount of the debt due in the case of a usufructuary mortgage by him. The new section was not intended to amplify the scope of the main Act by including persons specifically excluded in that Act by section 10 (2). The only remedy open to the mortgagors is to file a suit for redemption.

Section 19-A was not intended to affect the general law relating to usufructuary mortgages and to nullify an important and expressed exception to Act IV of 1938 itself.

K. Srinivasa Rao for Petitioner.

T. E. Ramabhadra Chariar, K. Devraj and K. Vittal Rao for Respondent.

K.S. —————— *Revision petition dismissed.*

Gentle, C.J. and Rajamannar, J. Appavu Udayan *v.* Nallammal.

12*th December*, 1947. L.P.A. No. 27 of 1947.

Hindu Law—Widow—Moral obligation of father-in-law in a divided family—Death of father-in-law makes it legal obligation—Indigence of daughter-in-law—If essential.

Under Hindu Law the father-in-law's moral obligation to maintain his widowed daughter-in-law arises out of the affinity between them; it is not dependent upon and is irrespective of the family status which existed between the father and the son. The incident of partition between the father-in-law and his sons does not affect the father-in-law's moral obligation which on his death will ripen into a

legal obligation on the part of his heirs inheriting his property. Case law considered and 23 Bom. 608 and 2 Bom. 573 dissented from.

It cannot be said that indigence must exist and is an essential factor before the liability to maintain can be established.

T. V. Ramanatha Aiyar for Appellant.

A. Srirangachari for Respondent.

K.S. ——— *Appeal dismissed.*

(F.B.)

Gentle, C.J. Rajamannar and Yahya Ali, JJ. A Pleader, *In re.*

15th December, 1947. Referred case No. 57 of 1947.

Legal Practitioners Act (XVIII of 1879), *section* 13—*Pleader giving evidence and continuing to appear for party—Propriety—If misconduct calling for disciplinary action.*

The conduct of a legal practitioner in giving evidence on behalf of his client without terminating his vakalat, is undesirable and deserves condemnation. It is no excuse to say that other counsel was engaged who was in charge of the case.

Obiter in (1942) 2 M.L.J. 479 approved.

In the absence of any authority or rule prohibiting such appearance there is a doubt whether the act is one which can be said to come within the provisions of clause (*b*) of section 13 of the Legal Practitioners Act necessitating disciplinary action and that doubt must be exercised in the pleader's favour.

Desirability of Bar Council framing rules on the matter pointed out.

The Advocate-General (*K. Rajah Aiyar*) for the Crown.

R. Gopalaswami Aiyangar for Pleader.

The complainant in person.

K.S. ——— *Order accordingly.*

Gentle, C.J. and Yahya Ali, J. Subbiah Pillai *v.* Sankarapandian Pillai.

16th December, 1947. Appeal No. 610 of 1945.

Civil Procedure Code (V of 1908), *Order VI, rule* 14 *and section* 99—*Plaint not signed by all the plaintiffs—Effect—Decree—If to be interfered with on appeal.*

Where a plaintiff has not signed a plaint filed with his knowledge and consent it is an omission which can be cured and should be corrected in the interests of justice. The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court. The curing of the defect comes within the provisions of section 99 of the Code of Civil Procedure. 17 Cal. 580 and 22 All. 55 relied on.

K. R. Rama Aiyar for Appellant.

K. Venkateswaran for Respondent.

K.S. ——— *Appeal dismissed.*

Govinda Menon, J. Buddanna, *In re.*

18th December, 1947. Cr.R.C. Nos. 924 and 925 of 1947.

(Cr.R.P. Nos. 822 and 823 of 1947.)

Criminal offence—Notification in District Gazette published only on 21st April, 1947 *calling on holder, occupier, tenant or lessee of cultivated land to declare on or before 15th April,* 1947, *stock of food grains held by him to the Tahsildar—Failure to declare stocks—If offence.*

A notification was published in the Kurnool District Gazette only on 21st April, 1947, directing every person who was a holder, occupier, tenant, sub-tenant or lessee of any cultivated land to declare the stocks of foodgrains held by him to the Tahsildar on or before 15th April , 1947. In revision against a conviction for not complying with the requisition,

Held : Non-declaration of stocks when the last day for doing so has expired even before the offence was created by the publication of the notification will not be criminal as it could not be said that the declaration should have been made

immediately after 21st April, 1947, though the date line mentioned in the notification had already expired. An order creating an offence like this should be interpreted strictly and the accused is entitled to such benefit.

G. Gopalaswami for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petitions allowed*

Rajamannar, J.
18th December, 1947.

Sree Raja Bommadeva Naganna *v*
Sree Boggavarappu Rama Krishna Rao.
S.A. Nos. 1189 and 1762 of 1945.

Transfer of Property Act (IV of 1882), *section* 70 *and Civil Procedure Code, Order* 34 —*Doctrine of accession—Applicability after decree for sale of the mortgaged property.*

The doctrine of accession contained in section 70 of the Transfer of Property Act would not cease to apply as soon as a decree for sale is passed on the foot of a mortgage. After the repeal of section 89 of the Transfer of Property Act and the enactment of Order 34, Code of Civil Procedure it cannot be contended that the mortgage does not subsist after the decree for sale. As the law now stands it would subsist till an actual sale has been held and confirmed. A.I.R. 1921 Pat. 188 and 41 M.L.J. 490 not followed. A.I.R. 1945 Bom. 248 relied on.

K. S. Desikan and P. Satyanarayana Raju for Appellants.

B. V. Subrahmaniam, V. Kameswara Rao and *K. Bhimasankaram* for Respondent.

K.S. ——— *Second appeals dismissed. No leave.*

Govinda Menon, J.
19th December, 1947.

Sathirulan, *In re.*
Cr.R.C. No. 263 of 1947.
(Cr.R.P. No. 252 of 1947.)

Cattle Trespass Act (I of 1871), *section* 24—*Applicability—Private forest in zamin to which portions of Madras Forest Act have been extended—Cattle trespassing into—Right of zamindar's watchmen to seize.*

Where a forest in a zamin has not been taken over by the Government as a reserve forest to which all the provisions of the Madras Forest Act are extended the zamindar must be held to be the occupier of the land and through his watchmen he can seize cattle trespassing on that land. The watchman when he is given general instructions to seize cattle trespassing on the land is entitled to seize them while so trespassing and the owners of the cattle rescuing the cattle while being driven to the cattle-pound will be guilty of an offence.

K. S. Champakesa Aiyangar and *K. C. Srinivasan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Sentence reduced.*

Govinda Menon, J.
8th January, 1948.

Kunhi Mohammed, *In re.*
Cr.R.C. No. 1028 of 1947.
(Cr.R.P. No. 924 of 1947).

Criminal Procedure Code (V of 1898), *section* 106—*Order under—When not justified.*

Where there is no credible evidence that the accused came to the complainant's house with the object of committing any offence nor with any sinister motive but it appeared that when he was surprised in his attempt to make overtures to the wife of the complainant by the sudden appearance of the complainant, the accused tried to make good his escape and in doing so pushed and caused injury to some one, section 106 of the Criminal Procedure Code cannot be invoked and an order under that section directing security to be taken from the accused would not be justifiable.

M. K. Nambiar and M. Sekhara Menon for Petitioner.

The Public Proscutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Order as to security set aside.*

Rajamannar, J.
17th December, 1947.

Narasimhamurthy *v.* Kameswaramma.
A. A. O. No. 436 of 1946.

Civil Procedure Code (V of 1908), *Order* 7, *rule* 11 (*a*)—*Plaint disclosing no cause of action—Duty to reject—Material on which Court can act—Evidence if can be adduced.*

Under Order 7, rule 11 (*a*) of the Code of Civil Procedure a plaint must be rejected when it does not disclose a cause of action. For this purpose the allegations in the plaint must be assumed to be true and that is the only material permissible on the issue. At that stage there is no question of either party adducing any evidence.

C. Rama Rao for Appellant.

B. V. Subrahmanyam for Respondent.

K.S. *Appeal allowed.*

Satyanarayana Rao, J.
17th December, 1947.

Kayichankandi Ayosha *v.* Kuhaikalathan.
S. A. No. 1908 of 1945.

Limitation Act (IX of 1908), *Article* 142—*Suit for possession—Vacant site—Extent and nature of proof of possession by plaintiff necessary—Presumption of possession from title—Sufficiency.*

The plaintiff sued in 1944 for recovery of possession of a site alleging that the defendant came into possession under an oral lease of 1932. It was found that the alleged oral lease was false but that plaintiff had title to the suit property. Neither side had established effective possession of the site till 1932 and the site was found to have been vacant.

Held: In the circumstances, possession must follow title and the plaintiff can rely on such presumptive proof of his possession. It is not essential for the plaintiff to prove effective possession by adducing evidence of acts of possession as owner.

Case-law discussed.

K. Kuttikrishna Menon for Appellant.

B. Pocker for Respondent.

K.S. *Second appeal allowed. No leave.*

Clarke, J.
19th December, 1947.

Paul *v.* Joseph.
C. R. P. No. 921 of 1946.

Arbitration Act (X of 1940), *section* 14—*Fourteen out of the fifteen arbitrators signing award—Validity of award.*

Where a reference to arbitration, with no provision to the contrary, can be regarded as one expressly containing a provision that the award of the majority shall prevail, and 14 of the 15 arbitrators (all the 15 of whom heard the proceedings) have signed the award, the award must be regarded as valid and binding inasmuch as it is signed by a majority of the arbitrators.

I.L.R. 23 Pat. 719, followed.

It cannot be said that the failure of one of the 15 arbitrators to sign the award is fatal to its validity by reason of the provisions of section 14 of the Arbitration Act.

K. Kameswara Rao and *N. Rammohana Rao* for Petitioner.

G. Venkatarama Sastri for Respondent.

K.S. *Petition dismissed.*

NRC

[F.B.]

Gentle, C.J., Rajamannar and Yahya Ali, JJ.
19th December, 1947.

Satyanarayanamurthi *v.* Venkataramanamurthi.
A. A. O. No. 520 of 1946.

Civil Procedure Code (*V of* 1908), *Schedule* II, *paragraphs* 17 *and* 5—*Scope—Agreement to refer to the arbitration of a named individual—Death of such individual before making award—Court, if can appoint another arbitrator in his place.*

When an agreement provides for arbitration by a named arbitrator or arbitrators, and such arbitrator or any one of such arbitrators is not available on account of death, refusal to act or other reasons before an application is made under paragraph 17 of Schedule II of the Civil Procedure Code, the Court has no power to appoint an arbitrator in his place. It is only if there is no provision in the agreement for the appointment of an arbitrator and the parties cannot agree, that the Court has power to appoint an arbitrator.

Where, however, on the date of an application under paragraph 17 the arbitrator was alive and died afterwards, the case should be decided on the footing that there was a valid order of reference to him and thereafter he died and the question, whether under paragraph 5 another arbitrator can be appointed by the Court in his place will have to be decided on the construction of the particular agreement.

If the intention of the parties as expressed in the muchilika is to be bound by the decision of a particular arbitrator, any provision which enables the Court to appoint another arbitrator would not be consistent with the agreement. The choice of a particular arbitrator by the parties is the result of personal confidence and trust in his knowledge, character and qualification and the question of personnel of the arbitrator is not a subsidiary and incidental matter.

I.L.R. 54 Mad. 469 and I.L.R. 17 Mad. 498 considered and held not to be really in conflict with each other.

P. Somasundaram for Appellant.

K. Bhimasankaram and *M. V. Nagaramayya* for Respondents.

K.S. *Appeal allowed.*

Govinda Menon, J.
7th January, 1948.

Chinnayya Goundan and others, *In re.*
Cr.R.C. No. 284 of 1947.
(Cr.R.P. No. 273 of 1947).

Criminal Procedure Code (*V of* 1898), *section* 195 (1)—*Offence under section* 188, *Penal Code—Complaint by public servant who promulgated order under section* 144, *Criminal Procedure Code—If essential—Prosecution for offence under section* 143 *giving up offence under section* 188, *Penal Code—Propriety and legality.*

Where on the same facts a general offence which does not require a complaint by a Court or a public servant is committed along with a more aggravated particularised form of offence, it is not open to the prosecution to circumvent the provisions of section 195, Criminal Procedure Code, by resolving to proceed with the general minor offence without attempting to move the Court or officer concerned for taking action under section 195, Criminal Procedure Code. If the facts considered as a whole disclose an offence for which a special complaint is necessary under the provisions of section 195, Criminal Procedure Code, a Court cannot take cognizance of the case at all unless that special complaint has been filed.

[Authorities discussed.]

Where the real offence committed is one under section 188, Penal Code, (conducting a bull play in defiance of an order under section 144 of the Criminal Procedure Code) the accused cannot be prosecuted for being members of an unlawful assembly with the common object of committing an offence, namely, the defiance of the order under section 144, Criminal Procedure Code, (which is itself an offence under section 188 of the Penal Code) without a complaint by the public servant who promulgated the order under section 144, Criminal Procedure Code. The real offence being one under section 188 of the Penal Code the accused cannot be tried for a minor offence under section 143, Penal Code.

N. Somasundaram and *P. Rajamanickam* for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. *Petition allowed.*

Govinda Menon, J.
15th January, 1948.

Makendadu, *In re.*
Cr. R. C. No. 804 of 1947.
(Cr. R. P. No. 697 of 1947).

Penal Code (XLV of 1860), *sections* 96 *and* 319—*Private defence—Limits—Two parties fighting and inflicting injuries on each other—Third party interfering on the side of one of the parties—Injury inflicted on him by member of the other party—If in private defence.*

When two parties not equally matched or even well matched, are fighting and inflicting injuries on one another, a third party interferes, not for separating them, but on the side of one of the contending parties, then if such third party receives an injury from the party to whom he wanted to inflict the injury, the person who causes the hurt is entitled to claim the right of private defence and will not be guilty of causing hurt.

J. S. Vedamanickkam for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. *Petition allowed and accused acquitted.*

Govinda Menon, J.
15th January, 1948.

Chand Bi, *In re.*
Cr. R. C. No. 1030 of 1947.
(Cr. R. P. No. 926 of 1947).

Madras Prohibition Act (X *of* 1937), *section* 4 (1) (*a*)—*Wife closing the house and then breaking pots containing illicit liquor—If in "possession" of the liquor and liable.*

Merely because the house where liquor was found belonged to the husband it cannot be inferred that the wife did not have possession of the illicit liquor. Where the wife broke the pots containing the illicit liquor after closing the house and the remains of the liquor after such destruction is recovered the wife can be held to have had possession, especially when there is other evidence and the admission of the wife herself that she was in possession and she will therefore be guilty under section 4 (1) (*a*) of the Madras Prohibition Act.

A.I.R. 1933 Pat. 272 and I.L.R. 15 All. 129, distinguished.

J. V. Srinivasa Rao for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. *Petition dismissed.*

Govinda Menon, J. Jayarama Chettiar, *In re.*
16th January, 1948. Cr. R. C. No. 375 of 1947.
(Cr. R. P. No. 361 of 1947).

Madras General Sales Tax Act (IX of 1939), *sections* 2 (*h*) *and* 15 (*a*)—*Scope—Dealer supplying to his customers silver wares in return for equivalent weight of silver plus the making charge in cash—Nature of transaction—If " sale " as defined in section* 2 (*h*)—*Failure to include in his return the value of such silver—If offence under section* 15 (*a*)—" *Wilfully* "—*Meaning of.*

The definition of "sale" in the Madras General Sales Tax Act is much wider in scope and amplitude than in the Sale of Goods Act. Though under the Sale of Goods Act in the case of a sale or contract of sale it is an essential requisite that the consideration should be money, in order to bring a transaction within the ambit of the term " sale " as defined in the Madras General Sales Tax Act, it need not necessarily be that money alone should be the consideration. When the property in a finished silver article is transferred to a purchaser in exchange for an equivalent weight in silver along with a sum of money equal to the manufacturing or making charges, there is a sale under the Sales Tax Act because the consideration for the sale is cash plus the quantity of silver. Though such a transaction may not amount to a sale under the Sale of Goods Act, as the price does not consist of money consideration alone, it is certainly a sale within the meaning of the term in the Madras General Sales Tax Act, since the material in the silver received by the dealer is "other valuable consideration " under section 2 (*h*) of the Sales Tax Act. The transaction cannot be said to be a " barter " which implies the transfer of different commodities. It cannot amount to a barter where the same commodity in a different form is exchanged. The failure by the assessee to include in his return the value of such silver constitutes an offence of " wilfully " submitting an untrue return. It is not necessary that there should be a criminal intent to render the omission wilful. The word " wilfully " has been inserted in section 15 to exclude cases of inadvertence or mistake but not cases where the omission was due to a wrong view of the law or ignorance of law. An assessee omitting to mention in his return a particular item with full knowledge of his having omitted the same does so " wilfully " though he may be under the impression that the mount is not taxable and therefore need not be included in the return.

K. S. Jayarama Aiyar and *K. Venkatanarasimham* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. *Petition dismissed.*

Horwill and Bell, JJ. Sahul Hameed Rowther *v.* Mohideen Pichai.
11th December, 1947. C.R.P. No. 775 of 1946.

Court-Fees Act (*VII of* 1870), *section* 7 (IV-*A*)—*Plaintiff alleging that sale deed executed by him in favour of defendant was sham and nominal and praying for declaration to that effect and for injunction restraining defendant from interfering with plaintiff's possession—Prayer for cancellation of deed and Court-fee for it—If necessary.*

Where a plaintiff alleges that a sale deed executed by him in favour of the defendant was sham and nominal and prays for a declaration to that effect and an injunction restraining the defendant from interfering with the plaintiff's possession it is not necessary for the plaintiff to pray for cancellation of the deed and to value his suit for purposes of Court-fee and jurisdiction under section 7 (iv-*A*) of the Court-fees Act. There can be no objection to the plaintiff's drawing the attention of the Court to the fact that in deciding whether the plaintiff was entitled to an injunction or possession, it would first have to decide whether the document in question was sham and nominal. It cannot be said that the plaintiff should pay additional Court-fee for cancellation merely because he mentions the sham document in his plaint.

Case law discussed.

A.I.R. 1929 Mad. 478 relied on.

Messrs. S. Srinivasaraghavan and *S. Ramachandra Aiyar* for Petitioner.

A. V. Narayanaswami Aiyar for Respondent.

K.S. *Petition dismissed.*

Happell and Govindarajachari, JJ. Kunhilakshmi Ammal *v.* Krishna Menon.
19th December, 1947. Appeal No. 112 of 1945.

Malabar tarwad—Suit for partition—Date of severance in status of defendants' tavazhi—Date of filing plaint or filing written statement.

The plaint is taken as the date on which a plaintiff who seeks partition severs his status because on the date on which he files the plaint he expresses his unequivocal intention of severing his status. In a suit for partition, however, unless it is by the father of the joint family, the mere expression of his intention to sever his status by the plaintiff in his plaint does not carry with it the severance of the other members of the family. If they have not previously expressed a desire for severance of status, their status will not be severed unless by their written statements they, in their turn, express their desire for severance. Accordingly the date on which such defendants severed their status must be the date on which they expressed their unequivocal intention of doing so, that is, the date on which they filed their written statements. Accordingly a member of a tavazhi of some of the defendants born during the pendency of a suit for partition by another member, though conceived after the filing of the plaint but before the filing of the written statement by her tavazhi would be entitled to a share.

The Advocate-General (*K. Raja Aiyar*) and *T. C. Raghavan* for Appellants.

K. Kuttikrishna Menon, C. Vasudeva Mannadiar, C. S. Venkatachariar, D. Ramaswami Aiyangar, M. V. Ramaswami Naidu and *T. A. Anantha Aiyar* for Respondents.

K.S. *Appeal allowed.*

Clark, J. Srirama Sarma *v.* Venkatappayya.
9th January, 1948. C.R.P. No. 1439 of 1945.

Madras Civil Courts Act (*III of* 1873), *section* 14 *and Court-Fees Act* (*VII of* 1870), *section* 7 (v)—*Suit for partition of certain property and for possession from the alienees—Jurisdictional value.*

In a suit for partition of certain property and for possession from the alienees the claims fall within section 7 (*v*) (*b*) of the Court-Fees Act and according to section 14 of the Madras Civil Courts Act the value for jurisdiction will be that fixed under section 7 (*v*) (*b*) of the Court-Fees Act, namely, ten times the annual revenue payable to Government.

50 Mad. 646 : 52 M.L.J. 381 and (1941) 2 M.L.J. 567 distinguished.

Ch. Raghava Rao for Petitioner.

C. V. Narasimha Rao for Respondent.

K.S. *Petition allowed.*

Happell, J. Mohamed Haji Gani *v.* Mohsin Raja.
16th January, 1948. C.R.P. No. 1095 of 1947.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *Section* 7—*Sub-tenant let into possession before commencement of Act—Suit for eviction—Maintainability—Provincial Small Cause Courts Act (IX of* 1877), *section* 41—*Scope.*

Where a sub-tenant is let into possession by the lessee before the commencement of Madras Act XV of 1946, the tenant cannot be evicted merely because of the subletting, and notwithstanding the fact that his tenancy has been terminated, his possession through the sub-tenant cannot be disturbed. The sub-tenant cannot be evicted by the landlord unless he is entitled to immediate possession.

Messrs. Azizuddin and *S. Mohiuddin* for petitioner.

P. Srinivasa Aiyangar for Respondents.

K.S. *Petition allowed.*

Clark, J. Chinnia Thevar *v.* Badsha.
20th January, 1948. C.R.P. No. 1878 of 1947.

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *section* 12—*Subordinate Judge notified as appellate authority is* persona designata *and not a "court subordinate to the High Court" under section* 115 *of the Civil Procedure Code.*

A Subordinate Judge notified as an appellate authority under the Madras Buildings (Lease and Rent Control) Act is appointed as *persona designata* and is not a Court subordinate to the High Court under section 115 of the Civil Procedure Code.

(1947) 1 M.L.J. 207 followed.

T. N. Sundaresa Aiyar for Petitioner.

V. S. Rangachari for Respondent.

K.S. *Petition dismissed.*

Clark, J. Panchaksharam Pillai *v.* Rangaswami Pillai.
21st January, 1948. C.R.P. No. 75 of 1947.

Civil Procedure Code (V of 1908), *Order* 6, *rule* 17—*Suit by trustee of temple for recovery of temple property wrongly alienated by way of possessory mortgage by another trustee—Subsequent sale by the mortgagor—Amendment of plaint by adding the remaining trustees, the transferee and his lessee—Permissibility.*

Where after the filing of a suit by a trustee for recovery of temple property wrongly alienated by way of possessory mortgage by another trustee. the mortgagor sells the property, an amendment of the plaint by adding the other trustees, the transferee and his lessee can·be allowed. The suit must be regarded as one for possession and when the person who is alleged to have wrongfully parted with the possession makes another transfer of the same property and by doing so puts another obstacle in the way of the plaintiff it would be most improper to refuse the amendment. The only effect of such a refusal would be to compel the plaintiff to file another suit and to delay him in securing a decision as to the right to possession which he claims. Such an amendment cannot be said to have the effect of changing the cause of action.

S. G. Rangaramanujam and *T. R. Kothandarama Mudaliar* for Petitioner.

K. S. Desikan for Respondent.

K.S. *Petition dismissed.*

Rajamannar, O.C. J. and *Satyanarayana Rao, J.* Gopala Menon, *In re.*
26*th January*, 1948. C.M.P. No. 6079 of 1947.

Legal Practitioner—Change of name—Amendment in certificate and roll of advocates—Scope and effect.

No doubt it is open to any person to change his name and after giving due notice of it in the Official Gazette, assume a new name. In accordance with such a change, there can be no objection to making a corresponding change in the name of an advocate appearing in the certificate of enrolment and in the roll of advocates and a formal order can be passed to that effect.

Where however the new name adopted (Nambudripad) *prima facie* also suggests that the person so adopting it belongs to a caste other than that which is indicated in his name (Menon) in the original roll and certificate the formal order consequent on the change of name notified in the Official Gazette should not be understood to have decided that the petitioner is entitled to describe himself as belonging to any particular caste.

Petitioner in person.

K.S. *Petition allowed.*

Govinda Menon, J. Swaranath Bhetia, *In re.*
28*th January*, 1948. C.A. No. 622 of 1947.

Madras Cotton Cloth and Apparel (Exports) Control Order, 1946*—Servant contravening provision of and exporting cloth in excess of quantity allowed by the permit—Liability of absent partner—Onus—Defence of India Rules, Rules* 5, 121, 122 *and* 123-*A—Scope.*

Where a partnership holding a permit exports cloth in excess of the yardage allowed by the permit under Madras Cotton Cloth and Apparel (Exports) Control Order, 1946, though the partnership cannot be said to be "other body corporate" under Rule 122 of the Defence of India Rules the partnership (and the individual partners) will be liable for failing without lawful excuse to secure compliance with the order. Every partner who fails without lawful excuse to secure compliance with the order shall be deemed to have contravened the provisions of the order. Rules 5, 121, and 123-A of the Defence of India Rules apply to the case. The burden according to Rule 123-A (of the Defence of India Rules) of proving that circumstances exculpating him exist is on such partner. The existence or otherwise of *mens rea* in the partner accused for the acts of his servant is irrelevant.

Leave to appeal to the Federal Court under section 205 of the Government of India Act, 1935, refused.

V. Sivaprasad for Appellant,

The Public Prosecutor (*V. L. Ethiraj*) for Crown Prosecutor on behalf o the Crown.

K.S. *Sentence reduced.*

Govinda Menon, J. Kapa Kasi Viswanadham *v.* Bondili Madan Singh
28th January, 1948. Cr.R.C. No. 1235 of 1947.
(Cr.R.P. No. 1121 of 1947).

Criminal Procedure Code (V of 1898), section 494—Permission to withdraw "Preliminary Register case"—If can be granted—Reasons for granting permission—If to be recorded.

It cannot be said that section 494, Criminal Procedure Code, does not authorise the Court to grant permission to withdraw a "Preliminary Register case" for the reason that in such a case the Sub-Magistrate cannot pronounce judgment. Even in a Preliminary Register case it is open to a Magistrate under section 209, Criminal Procedure Code, after recording evidence to decide whether it is a case triable by himself or whether the same should be committed to a Court of Session. Section 209 gives ample power to a Magistrate inquiring into cases triable by a Court of Session or the High Court to convert what was initiated as a Preliminary Register case into a calendar case in which the Magistrate can pronounce judgment. The expression in section 494, Criminal Procedure Code "in other cases before judgment is pronounced" is wide enough to include a Preliminary Register case as well and the Magistrate can grant permission to withdraw the same.

It is not obligatory upon the Magistrate to record any reasons for the with drawal and an order of discharge cannot be interfered with in revision unless it is shown that the Magistrate in granting permission to withdraw has acted arbitrarily or in any unjudicial manner.

A. Ramachandran of Messrs. Row and *Reddy* for the Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

V. Rajagopalachari, M. V. Ganapathi and *M. Ranganatha Sastry* for Respondents.

K.S. *Petition dismissed.*

Govinda Menon, J. Karnam Ramayya, *In re.*
29th January, 1948. Cr.R.C. No. 592 of 1947.
(Cr.R.P. No. 488 of 1947).

Criminal trial—District Magistrate disposing of appeal by passing an order directing Court of first instance to file a complaint—High Court setting aside the order—District Magistrate cannot suo motu *pass fresh order directing the filing of a complaint.*

When once the District Magistrate had disposed of the appeal by passing an order directing the Court of first instance to file a complaint he is *functus officio* as regards the appeal before him. Where the High Court has set aside the order and refused to remand the appeal to the District Magistrate, it is not open to the District Magistrate to proceed *suo motu* and pass a fresh order directing the filing of a complaint before a Magistrate.

C. K. Venkatanarasimham for the Petitioner.

The Public Prosecutor (*V. E. Ethiraj*) on behalf of the Crown.

K.S. *Petition allowed.*

Gentle, C.J. and Satyanarayana Rao, J. Rangappa Naidu *v.* Venkalakshmamma.
7th January, 1948. A. A. O. No. 581 of 1946.

Hindu Law—Joint family—Partition suit—Effect—Division in status—Tenants in common—Possession of one—If of a fiduciary character—Liability to account—Basis.

Upon the institution of a partition suit rupture takes place in the family status and the coparceners in respect of the property become tenants in common. In regard to one of two or more tenants in common, possession of property by one is not one of a fiduciary character and the person in possession cannot be called upon to account on that basis. He must however account in the ordinary way in respect of joint family property which was in his possession solely as between tenants in common.

K. Krishnamurthi and *G. Suryanarayana* for Appellant.

Ch. Raghava Rao for Respondent.

K.S. ——— *Appeal allowed.*

Gentle, C.J. and Satyanarayana Rao, J. Dorairaja Naidu *v.* Veeraraghava Reddi.
12th January, 1948. Appeal No. 167 of 1945.

Hindu Law—Succession—Bandhu claiming right of—Onus—Gift of estate by widow—If can be treated as surrender—Mesne profits.

A plaintiff (daughter's son's son) claiming to succeed as bandhu to the estate of the last male holder under Hindu Law is bound to establish two facts: (1) the particular relationship to the last male holder put forward by him and (2) to satisfy the Court that to the best of his knowledge there are no nearer agnatic heirs within fourteen degrees. Such plaintiff is not expected to prove an absolute negative in the sense of exhausting all known possible heirs. Where the plaintiff has adduced evidence regarding the absence of any nearer agnatic heirs and the defendants adduced no evidence nor indicated in their cross-examination of the plaintiff's witnesses of the existence of any members of the family of the last male holder, the burden of proof must be deemed to have been discharged by the plaintiff.

A deed by a Hindu widow purporting to convey an absolute estate to the donees (her daughter and son-in-law jointly) by way of gift by reason of the relationship to the donor cannot be supported on the theory of surrender.

Such alienees would be liable for mesne profits from the date of the death of the widow.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellants.

T. Rangaswami Aiyangar, V. Vedantachari, T. Venkatachari and *A. Bhujanga Rao* for Respondents.

K.S. ——— *Appeal allowed.*

Rajamannar, J. Venkataswamy Naidu *v.* Akkulaiya Naidu.
16th January, 1948. A. A. O. No. 378 of 1946.

Malicious prosecution—Action for damages for—Gist of—Proceedings under section 145, *Criminal Procedure Code—If can be basis of action for damages for malicious prosecution.*

The gist of the action for malicious prosecution is damages which may be damages of three kinds: (1) Damages to a man's fame as if the matter whereof he is accused be scandalous. (2) Damages to the person as where a man is put in danger to lose his life, limb or liberty, which has been always allowed as a good foundation of such an action. (3) Damage to man's property as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused.

At least one of these three heads of damages must be established to support an action for malicious prosecution.

Proceedings under sections 145, 146 and 147 of the Criminal Procedure Code, stand on the same footing as an ordinary action at law. They do not necessarily or naturally involve any one or more of the three heads of damage to reputation, person or property. In such proceedings the Magistrate has ample power to award costs under section 148 (3). Nor can such expenses incurred be recovered

from persons said to be instigating the proceedings under section 145, Criminal Procedure Code.

An action for malicious prosecution is not sustainable in respect of proceedings under section 145, Criminal Procedure Code.

A. Sundaram Aiyar for Appellants.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Respondents.

K.S. ——— *Appeal allowed and Leave granted.*

Horwill and Kunhiraman, JJ. Mappilasami Thevar *v.* Muthuswami Iyer.
19th January, 1948. Cr. R. C. No. 883 of 1947.
(Cr. R. P. No. 773 of 1947).

Criminal Procedure Code (V of 1898), *section* 259—*Absence of complainant when case called at the second hearing—Order discharging accused—Later appearance of complainant with justifiable reason for not being present—Power of Magistrate to take the case on file and proceed with the trial.*

As the complainant was absent when the case was called at the second hearing the Magistrate discharged the accused. The complainant later appeared and said that he had been inadvertently delayed and asked the Magistrate to again inquire into the matter. Finding that there was good cause for his absence the Magistrate took the case on file and gave it a fresh number. He proceeded with the trial and convicted the accused. On revision it was contended that there was no jurisdiction to try the case in the absence of a fresh complaint.

Held, it is permissible to extract the original complaint from the old file and use it as a foundation for the new trial. The irregularity in not strictly complying with the provisions of section 200 of the Criminal Procedure Code and examining the complainant on oath can in the circumstances be cured by section 537 of the Criminal Procedure Code.

K. S. Jayarama Iyer and *C. K. Venkatanarasimham* for Petitioners.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

S. Krishnamurthi and *Vepa P. Sarathi* for Respondent.

K.S. ——— *Revision case dismissed.*

Happell and Govindarajachari, JJ. Suryanarayana Reddy *v.* Venkata Reddy.
21st January, 1948. Appeal No. 548 of 1945.

Arbitration Act (X of 1940), *sections* 32 *and* 33—*Unfiled award which had been fully performed—If can be relied on by way of defence.*

A defendant is not precluded from putting forward an award which has been fully performed by him but which was not filed under section 14 of the Arbitration Act and according to which a judgment was not pronounced or a decree given under section 17 of the Act, in answer to a claim which was the subject-matter of such reference and award. The language of section 32 of the Arbitration Act does not extend to a defence as opposed to the filing of a suit. *Case-law discussed.*

If the Legislature intended or intends to forbid reliance on an unfiled award even by way of defence the language of sections 32 and 33 would require suitable modification.

K. Subba Rao and *S. Obul Reddi* for Appellants.

P. Somasundaram and *C. Kondiah* for Respondent.

K.S. ——— *Appeal allowed.*

Clark, J. Punnaiya *v.* Bhadraiya.
27th January, 1948. C. R. P. No. 1246 of 1946.

Partnership Act (IX of 1932), *section* 69 (3)—*Scope—Dissolved unregistered partnership—Suit by one partner for recovery of debt due to firm allotted to him—Maintainability.*

The words of sub-clause (3) of section 69 of the Partnership Act are very wide and remove any disability which existed during the continuance of the partnership, and accordingly one of the partners of a dissolved unregistered partnership who

by an arrangement with the other partners had become entitled to a debt due from a third party to the partnership can sue to recover that debt and it cannot be contended that such a suit is not maintainable by reason of section 69 (2) of the Partnership Act.

(1944) 2 M.L.J. 406, not followed; (1947) 2 M.L.J. 241, followed.

G. Chandrasekhara Sastri for Petitioner.

Respondent not represented.

K.S. ——— *Case remanded.*

Govinda Menon, J. Mohammed Hassan Sahib *v.* The Podanur Sunnath Jamath.
3rd February, 1948. C. R. P. No. 249 of 1947.

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 8—*Application for leave to file a suit in representative capacity—Considerations in granting—Conflicting affidavits stating that petitioners had and had not representative capacity—Effect—Duty of Court.*

In an application for leave under Order 1, rule 8 of the Code of Civil Procedure the defendants filed a counter stating that the applicants did not represent the general body of Muslims of the locality. During the course of the hearing of the application the petitioners filed 134 affidavits each deponent stating that the petitioners have got such representative status. On the other hand the respondents filed 97 affidavits, disputing the representative character of the petitioners to file the suit. The trial Court held that the plaintiffs could only be permitted to sue in their individual capacity and not as representing any common interest of the community and refused leave to file the suit on behalf of the community. On revision,

Held, the Court should not refuse leave to file a suit simply because there are, in opposition, quite a number of people contesting the plaintiffs' claim. It is the duty of the Court to grant leave to the plaintiffs to sue on behalf of the particular group of persons if it was a *bona fide* claim. In such cases what the Court ought to do is to define a group of individuals among the defendants also who can represent the opposite group.

S. Thiagaraja Aiyar for Petitioners.

V. C. Viraraghavan for Respondents.

K.S. ——— *Petition allowed.*

Rajamannar, O.C.J. Ranganatha Iyengar; *In re.*
6th February, 1948. C.R.P. No. 174 of 1948.
(*For admission*).

Soldiers Litigation Act (*IV of* 1925)—*Rules under—Rule* 7—*Scope and effect*—Ex parte *decree in contravention of rule requiring postponement of suit—Power of appellate Court to set aside under inherent powers.*

Rule 7 of the rules made under the Soldiers Litigation Act makes it incumbent on the Court to postpone proceedings till the receipt of a certificate in form D that no postponement is necessary. Where an *ex parte* decree is passed without such a certificate being received, the District Court on appeal can set it aside even if not strictly under Order 9, rule 13, certainly under section 151 of the Code of Civil Procedure.

T. E. Ramabhadrachari for Petitioner.

K.S. ——— *Petition dismissed.*

Govinda Menon, J. P. N. S. Aiyar *v.* K. J. Nathan.
10th February, 1948. Cr. R. C. No. 612 of 1947.
(Cr. R. P. No. 507 of 1947).

Criminal Procedure Code (*V of* 1898), *section* 202 (1), *proviso—Scope—Presidency Magistrate—Postponement of the issue of process by directing police officer to enquire into the case—Duty of Magistrate to examine complainant on oath before doing so—Presidency Magistrate not excepted from such obligation.*

There is no difference between any other Magistrate and a Presidency Magistrate in the case of examining the complainant before the postponement of the issue of process and the ordering of an inquiry under section 202 (1) of the Code of Criminal Procedure. Before the Magistrate sends the complaint to the police for enquiry, he should ascertain the truth or falsehood of the complaint by an examination on oath of the complainant. An admission that the contents of the complaint are correct on solemn affirmation by the complainant will not be a compliance with the mandatory provisions of section 202. The non-examination of the complainant on oath is not an error, omission or irregularity in the complaint which can be cured by section 537 of the Criminal Procedure Code. It is an illegality which goes to the root of the proceedings.

K. V. Ramaseshan for Petitioner.

B. T. Sundararajan and *M. Srinivasagopalan* for Respondent.

Santosh for the Crown Prosecutor on behalf of the Crown.

Order reversed and case remanded for fresh disposal.

K.S.

Horwill, J. Venkatasubbiah *v.* Rangiah.
13th February, 1948. C. R. P. No. 137 of 1947.

Practice—Revision—Order returning plaint for amendment—Revision—Not maintainable.

Where a plaintiff in his plaint refers to the defendant at times as an agent and at other times as trustee and also refers to certain transactions as nominal and brought about by undue influence and his intention is to interpret his plaint in one way for purposes of court-fee and in another way during the trial, the trial Court is justified in returning the plaint for amendment, so that the plaintiff should be tied down to one specific case both for purposes of court-fee and for trial. A revision petition is not maintainable against an order calling upon the plaintiff to amend his plaint, whatever the reasons were for the order.

M. S. Ramachandra Rao for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Government.

Ch. Raghava Rao for Respondent.

K.S. *Petition dismissed.*

Govinda Menon, J. Munuswamy Chetty *v.* Munuswamy Chetty.
13th February, 1948. Cr. R. C. No. 897 of 1947.
(Cr. R. P. No. 786 of 1947).

Penal Code (*XLV of* 1860), *section* 425—*Mischief—Wall built by owner on his land—Demolition by person claiming right of way—Offence.*

It cannot be said that a person aggrieved can abate a nuisance with a *bona fide* intention. Where the owners had built a wall on their land and the accused who had been exercising a right of way demolished that wall the accused cannot escape liability on the ground that they acted in the *bona fide* exercise of their right of way. In a revision against acquittal at the instance of the complainant having regard to the technical nature of the offence and the fact that the parties were near relations a rehearing of the appeal was not ordered.

I.L.R. 39 Mad. 57, not followed ; I.L.R. 57 Mad. 351 and I.L.R. 51 Bom. 487, relied on.

T. Rangaswami Iyengar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

T. E. Ramabhadrachariar for Respondents.

K.S. *Revision dismissed.*

Chandrasekhara Aiyar, J. Krishnamma Naidu *v.* Chinna Venkatapathy Naidu.
16th January, 1948. S.A. Nos. 1614, 1874 to 1877 and 2114 of 1945.

Madras Estates Land Act (I of 1908), *sections* 77 *and* 42—*Suit for rent—Landlord when can claim rent for excess areas in the holdings—Remedy of landlord.*

A mere statement of the area as well as the rent in the patta does not discharge the burden on the landlord to prove that the rents were fixed with reference to the areas mentioned so as to enable the landlord to claim rent for any excess area in the holding. He must prove that the area was the basis for the fixation of the rent specified in the patta. If the rent mentioned was a consolidated rent for the field in question, assumed to be roughly of a particular area, then the remedy of the landlord, if the area found in the tenant's possession is in excess of what is stated in the patta, is to apply under section 42 of the Madras Estates Land Act to the Collector. The landlord cannot under section 77 sue successfully for the rent for the excess area. He may take appropriate steps under section 42, clauses (1) and (2) for relief at the hands of the Collector.

A.I.R. 1937 Cal. 632, relied on.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellants.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondents.

K.S. ——— *Appeal allowed. Leave refused.*

Govinda Menon, J. Muhammad Abdul Halim Baig *v.* Muhammad Ali Hussain.
22nd January, 1948. C.M.P. No. 7312 of 1947.

Receiver—Party appointed as receiver—Not entitled to any remuneration unless technical or scientific skill on his part is required.

Generally where a party is appointed receiver he is not allowed a salary unless by consent of parties. There may be a few exceptions to that rule as where a trustee functioning as a receiver is entitled to get the same remuneration, which he was getting before becoming a receiver. Where a party is appointed a receiver for carrying on quarrying operations on a seignorage basis in a hillock, which formed the subject-matter of the litigation, as no special scientific skill or any technical knowledge is necessary, the receiver is not entitled to any remuneration especially where the party receiver has not suffered by any loss of employment or occupation during the period. He will be entitled to reimburse himself out of the monies belonging to the estate, the expenses incurred in the conduct as receiver of suits and proceedings.

(1892) 1 Ch. 59 ; I.L.R. 1942 Nag. 671 and 90 I.C. 492, referred to.

B. Lakshminarayana for Petitioners.

A. Raghavayya, K. Kameswara Rao, Y. G. Krishnamurthy and *J. Azizuddin* for Respondents.

K.S. ——— *Petition dismissed.*

Govindarajachari, J. Syed Abbas Saheb *v.* Syed Amir Hamiza Saheb.
23rd January, 1948. A.A.O. No. 607 of 1946.

Limitation Act (IX of 1908), *section* 10—*Applicability—Provision for certain charities to be performed and for payment of balance of income to members of family proportionate to their shares according to the Muhammadan Law—Trust for specific purpose if created.*

Where by a deed of settlement there is first a direction for the expenses to be incurred on certain religious purposes and following this there is a direction that the surplus or the remainder should go to and be applied for the benefit of certain persons, there is a trust in respect of the latter part of the disposition as in respect of the former. A specific purpose includes a purpose which, from the specified terms, can be certainly affirmed. Accordingly, the distribution of the

surplus in named proportions is a specific purpose, and section 10 of the Limitation Act is applicable.

S. Panchapagesa Sastri and *K. V. Srinivasa Aiyar* for Appellants.

N. Rajagopala Ayyangar for Respondents.

K.S. —— *Appeal dismissed. Leave refused.*

Rajamannar, O.C.J. and Satyanarayana Rao, J. *3rd February,* 1948.

Parthasarathy Gupta *v.* Calcutta Glass and Silicate Works (1936), Ltd. O.S.A. No. 38 of 1947.

Sales of goods—Provision for payment of price—Place of payment—Confers jurisdiction.

A part of the cause of action to sustain a suit for damages for breach of contract would arise at the place where performance of the contract is provided. " Performance of the contract " may consist in delivery of goods as well as payment of the price.

In a contract the price was fixed F.O.R. Calcutta. The delivery of the goods was at Calcutta itself. The goods were to be delivered to the vendee or his agent at Calcutta to be despatched to the vendee's place of business at Madras. The right to payment arose simultaneously with the delivery of the goods to the vendee through his agent, but the method of payment was provided thus :—An amount not less than 25 per cent. of the price and if possible more had to be paid before the goods were allowed to be despatched and the balance due was allowed to be paid by arranging to send the railway receipt through a Bank in Madras. In the circumstances,

Held : The legal effect of these terms was to provide for the passing of the property from the seller to the buyer at the time when the goods were delivered to the buyer's agent against payment of not less than 25 per cent. of the price. Thereafter the relationship between the parties ceased to be that of vendor and purchaser and became converted into that of creditor and debtor. For the balance of price a pledge, as it were, was created by delivering the railway receipt to the vendors who realised the amount through the bank and handed over the receipt through the bank to the buyer on discharge of the loan. It was not an essential term of the contract that payment was and had to be made at Madras.

Accordingly, no part of the cause of action can be said to have arisen at Madras and leave to the buyer to institute a suit in the Madras High Court for damages for a breach of the contract cannot be granted.

C. Vasudevan for Appellant.

T. V. Subramania Aiyar for Respondent.

K.S. —— *Appeal dismissed.*

Rajamannar, O.C.J. and Satyanarayana Rao, J. *3rd February,* 1948.

Gurulinga Mudaliar *v.* Thayyanayaki Ammal. O.S.A. No. 69 of 1947.

Succession Act (XXXIX of 1925), *section* 375 (1)*—Hindu widow—If can be required to furnish security at the instance and for the benefit of a presumptive reversioner for debts in respect of which the succession certificate is granted to her—Remedy of such reversioner.*

It is doubtful if the provision in section 375 (1) of the Succession Act could be availed of by a presumptive reversioner who has no present interest in the whole or any part of the debts and securities covered by the succession certificate granted to a widow. The widow is under no duty to render an account to any one, least of all to the presumptive reversioner. There is no right of indemnity in a reversioner in respect of property which devolves on a Hindu widow. The reversioner is in no sense entitled to the whole or any part of the debts and securities comprised in the estate of the last male holder in the hands of the widow.

Obiter.—Section 375 (1) of the Succession Act does not empower the Court to require a Hindu widow to furnish security for debts and securities in respect of which a succession certificate is granted to her at the instance and for the benefit of a presumptive reversioner.

Lingamma v. *Venkayya*, (1944) 1 M.L.J. 288, doubted.

However the point was not finally decided as it was found that there were no circumstances special or otherwise to justify an order for security in the case.

The Hindu law provides for a right of suit to the presumptive reversioner in cases of waste committed by the widow for an injunction to restrain the committing of waste on her part. Otherwise, the widow is not under any disability in respect of the property to which she succeeds on her husband's death. Accordingly the widow cannot be called upon to furnish security.

N. K. Mohanarangam Pillai and *M. V. Gopalaratnam* for Appellant.

A. Seshachariar and *K. Raghavan* for Respondent.

K.S. ——— *Appeal dismissed.*

Horwill, J. Lakshminarayana *v.* Subbayya.
6*th February,* 1948. S.A. No. 1017 of 1946.

Madras Hindu Religious Endowments Act (*II of* 1927), *section* 19, *Explanation and section* 43—*Scheme found to be unworkable—Power of Board to appoint interim trustee—Powers of such trustee.*

Where a scheme is found to be unworkable the Endowment Board has power to temporarily abrogate the scheme by appointing an interim trustee until a suitable permanent arrangement could be made. As the interim trustee's appointment is proper and valid, he has authority to take disciplinary action against archakas and dismiss them. A suit by the archakas in a Civil Court to cancel or modify the order will be barred by section 43 (2) and (3) of the Madras Hindu Religious Endowments Act which provide an appeal to the Assistant Commissioner and a further appeal to the Board.

V. Parthasarathi for Appellant.

P. Satyanarayana Raju for Respondents.

K.S. ——— *Appeal allowed.*

Rajamannar, O.C.J. and Vedachala Mudaliar *v.* Central Road Traffic Board.
Satyanarayana Rao, J. C.M.P. No. 60 of 1948.
17*th February,* 1948.

Writ of certiorari—*Jurisdiction of High Court to issue for quashing proceedings of Central Road Traffic Board, Madras—Non-availability of remedy by way of* certiorari *to subjects outside the original jurisdiction of High Court—Need for legislation to remove anomaly.*

X, a proprietor of a bus transport service had been granted permits to run three buses on the route from Madras to Mahabalipuram. On 1st December, 1946, the proprietor applied to the Regional Transport Officer, Vellore, for permission to divert his buses at a village on the route and the application was ordered on 26th April, 1947. *Y*, another bus service who had never objected to the diversion preferred an appeal to the Road Traffic Board on 29th April, 1947 and that appeal was allowed on 25th June, 1947. A petition by *X* to the Provincial Government was dismissed on 17th December, 1947. *X* thereupon filed an application to the High Court for the issue of a writ of *certiorari* to quash the order of the Central Road Traffic Board on the ground that the appeal by *Y* was incompetent as *Y* had not objected to the grant of *X's* application for diversion of the route. It was conceded that the appeal was incompetent. On the question of jurisdiction,

Held: The High Court has jurisdiction to issue a writ of *certiorari* for quashing the proceedings as the petitioner's transport business was carried on partly in Madras.

It is a matter for consideration that persons within the limits of the Original Jurisdiction of the High Court should have a remedy to approach the High Court for the issue of a writ of *certiorari* to quash illegal orders and orders made without jurisdiction, but that in respect of similar orders relating to subject-matter outside the Original Jurisdiction of the High Court such a remedy should be denied to parties outside its original jurisdiction. Whatever historical accidents might justify the ruling of the Judicial Committee in *Ryots of Garabandho* v. *Zamindar of Parlakimedi*, (1943) 2 M.L.J. 254 : I.L.R. 1944 Mad. 457 (P.C.) ; there is no reason why the anomaly resulting therefrom should be allowed to be continued. This is a matter for the Legislature.

A. V. Viswanatha Sastri and *S. Swaminathan* for Petitioners.

The Advocate-General (*K. Rajah Aiyar*) instructed by the Crown Solicitor for the Road Traffic Board.

P. S. Kailasam for 2nd Respondent.

K.S. ——— *Order quashed.*

Govinda Menon, J. Arunachala Goundan, *In re.*
18th February, 1948. Cr. R. C. Nos. 557 and 558 of 1947.
(Cr. R. P. Nos. 453 and 454 of 1947).

Criminal trial—Commencement and conclusion of inquiry after Court hours—Propriety—Conviction on plea of guilty by Second Class Magistrate—Appeal on merits—Maintainability—Setting aside conviction on account of illegality or irregularity in trial—Re-trial if to be ordered—Criminal Procedure Code (V of 1898), *sections* 412 *and* 423*—Scope.*

Except under very abnormal and unusual circumstances, no Court is justified in taking up and proceeding with the trial of a criminal case after the usual Court hours. Lawyers are not expected to attend Court at such unusual times and parties or witnesses cannot be compelled apart from their express desire, to attend Court out of normal hours. It may very well be and is proper that a case which has been started during the working hours of the day, may be prolonged after office hours under exceptional conditions, but that would not justify a Court in initiating a trial or enquiry long after 5 P.M. and continuing the same at a stretch till 9 P.M. Such a trial is not a fair or proper one and is therefore vitiated.

Under section 412 of the Criminal Procedure Code, the prohibition against an appeal except as regards the extent or legality of the sentence when an accused is convicted on his own plea of guilty, is restricted to the conviction by a Court of Session, Presidency Magistrate or a Magistrate of the First Class. Where therefore such trial Court is a Magistrate of the Second Class, an appeal lies not only on the question of sentence but also on the merits of the case as well. The appellate Court in such case has ample power to go into the evidence and find out whether the proper procedure has been followed and whether the appellants had a fair trial. In any event the provisions of section 412 of the Criminal Procedure Code are not applicable in revision and the powers of High Court are not at all curtailed or circumscribed by this section. The powers of the High Court in revision in a case where the accused has been convicted on his plea of guilty are as ample as if an appeal on the merits had been entertainable.

Where it is found that the plea of guilty ought not to have been accepted the conviction must be set aside. But in such a case though the usual procedure is to order a re-trial, such need not always be the rule and the Court can refuse to order a re-trial. When once an irregular or improper conviction has been set aside as void and a fresh trial is not ordered it amounts to a discharge of the accused. Where the accused has already undergone a period of sentence under the conviction which is set aside, it is unnecessary to order a re-trial and the Court of revision will refuse to order a re-trial.

N. Somasundaram and *P. S. Kailasam* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petitions allowed.*

Rajamannar, O.C.J. and Satyanarayana Rao, J. 27*th January*, 1948.

Ramachandra Rao *v.* Narayana Rao. Appeal No. 439 of 1946.

Evidence Act (I of 1872), *sections* 32 (5) *and* 80—*Scope—Memorandum of evidence given in a summons case—Presumption under section* 80, *that evidence was duly taken—Conditions necessary for—Statement is that of witness purporting to have made it and not of the Magistrate recording it—Admissibility under section* 32 (5) *of the Evidence Act.*

The presumption laid down in section 80 of the Evidence Act applies to a record of the deposition by a witness in the shape of a memorandum of the evidence "signed by the recording Magistrate". The omission of the designation beneath the signature of the Magistrate does not preclude the Court from holding that the memorandum of evidence purports to be signed by a Magistrate. The Court can presume that the evidence contained in the memorandum was duly taken. The statements of witnesses contained in the memorandum would be the statements of the respective witnesses. The Magistrate does not make any statement at all. He merely makes a memorandum of the evidence (as it is permitted in a summons case tried before a Magistrate other than a Presidency Magistrate) instead of taking verbatim the evidence. It cannot be said that the statement is only the statement of the Magistrate that the witness made the statement in question and therefore inadmissible. Such a statement is admissible in evidence under section 32 (5) of the Evidence Act.

K. Bhashyam Ayyangar, T. R. Srinivsan and *R. Desikan* for Appellant.

T. V. Muthukrishna Iyer and *N. Karpakavinayakam* for Respondent.

K.S. *Appeal dismissed.*

Rajamannar, O.C.J. and Satyanarayana Rao, J. 29*th January*, 1948.

Rukmaniammal *v.* Aiyara Pillai. S.A. Nos. 54, 55, 1090 and 1570 of 1945.

Hindu Law—Settlement deed—Construction—Gift of estate to wife and after the lifetime of settlor and his wife to daughter and her heirs after her—Nature of estate conferred—Adoption by widower—Effect—Adoptee's right to property of predeceased wife of widower.

Where a settlor provided by the deed "My wife, the aforesaid *U* shall maintain me and enjoy from this day onwards the punja and nanja lands of 11 acres and 16 cents and houses worth Rs. 4,000 as per description of the undermentioned lands . . . . My aforesaid wife shall pay the debt of Rs. 675, which I owe as per undermentioned particulars. Now I have a female child called *S* aged 3½ years. My daughter, the aforesaid *S*, after us and her heirs after her, shall enjoy the properties. If meanwhile I beget male issue, the male issue shall get the properties." On a construction of the deed,

Held: (*i*) *U* did not obtain an absolute estate under the settlement deed. Nor was the estate taken by her that of a female heir under Hindu Law. It will be extraordinary to hold that a Hindu making a gift *inter vivos* could create an estate corresponding to a widow's estate in favour of his wife. *U* took only an estate for life under the settlement deed.

(*ii*) The words "*S* and after her heirs" do not mean anything more than "*S* and her heirs" and *S* would be entitled to an absolute estate in the properties covered by the settlement deed.

Case-law reviewed.

The question whether on an adoption by a Hindu widower the adopted son will take the estate of the deceased wife divesting any intermediate estates was referred to a Full Bench, but as the case could be decided on other grounds the correctness or otherwise of the decision in *Subramaniam* v. *Muthiah Chettiar*, (1945) 2 M.L.J. 337 : I.L.R. 1945 Mad. 638 was not decided by the Full Bench.

N R C

R. Gopalaswami Iyengar for (Defendants) Appellants.

S. Panchapagesa Sastri, P. S. Raghavarama Sastri and *Alladi Kuppuswamy* for (Plaintiffs) Respondents.

Suit dismissed.

K.S. —— *S.A. Nos.* 54, 55 *and* 1090 *of* 1945 *allowed* and *S. A. No.* 1570 *of* 1945 *dismissed.*

Govinda Menon, J. Roderigues *In re.*
30th January, 1948. Cr.R.C. No. 934 of 1947.
(Cr.R.P. No. 832 of 1947.)

Criminal Procedure Code (V of 1898), *section* 250—*Scope—Magistrate refusing to examine all the witnesses tendered by complainant and dismissing complaint as false—Propriety—Order directing payment of compensation to accused—Not sustainable.*

In cases where the Magistrate has not examined all the witnesses whom the complainant wants to examine, he will not be justified in discharging the accused on the ground that the whole complaint was false and vexatious. Where the Magistrate has rejected an application of the complainant to examine a witness in his list without adequate reasons and discharged the accused an order directing compensation to be paid to the accused is unsustainable.

M. L. Nayak for Petitioner (complainant).

K. Srinivasa Rao for Respondent (accused).

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. —— *Order of compensation set aside and revision allowed to that extent.*

Horwill, J. Kuppammal *v.* Seetharama Aiyar.
9th February, 1948. A.A.O. Nos. 602 and 603 of 1947.

Civil Procedure Code (V of 1908), *Order* 39, *rule* 1 *and section* 151—*Scope—Temporary injunction—If can be granted under inherent jurisdiction when a case does not fall under Order* 39.

The power of Subordinate Courts to grant temporary injunctions during pendency of appeals must be found within the four corners of the Code and it is too much to suggest that when the Code has expressly dealt with injunctions in Order 39, section 151, can be invoked to add to the powers thus conferred.

B. Srinivasamurthi for Appellant.

V. Ramaswami Aiyar for Respondent.

K.S. —— *Appeals dismissed.*

Rajamannar, O.C.J. and Pedda Iswara Reddy, *In re.*
Satyanarayana Rao, J. S.R. Nos. 22769 and 22771 of 1947.
17th February, 1948. (C.R.P. sought to be presented.)

Provincial Insolvency Act (V of 1920), *sections* 5 *and* 75—*Scope—Order allowing an application under Order* 1, *rule* 10, *Civil Procedure Code in an Insolvency Petition pending before that Court seeking to add the alienees of debtor's properties as parties—Appeal to District Court will lie—Revision by High Court—Not competent.*

Section 5 cannot override the provisions of section 75 of the Provincial Insolvency Act in so far as the latter section confers a right of appeal in any instance. It is not permissible to read the provisions of section 75 with a further modification that the provisions are subject to the provisions of the Code of Civil Procedure in regard to appeals. An order allowing an application in an Insolvency Petition pending before the Court seeking to add certain alienees of the debtor's properties as parties finally decides the matter and therefore would fall within the words, " a decision come to or an order made " in section 75 (1) of the Provincial Insolvency Act and therefore appealable. As such appeals could have been filed to the District Court revision petitions against such orders filed in the High Court will not be competent.

P. Chandra Reddi for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Government.

K.S. —— *Petitions dismissed.*

Rajamannar, O.C.J. and Satyanarayana Rao, J.
18th February, 1948.

Rathnasabapathy Nadar and Sons *v.* Sha Misrimull Javanthraj & Co.
O.S.A. No. 68 of 1947.

Presidency Towns Insolvency Act (III of 1909), *section* 9—*Trader absenting himself from place of business—Presumption of intention to defeat and delay creditors—Debtor leading no evidence to account for his absence—Presumption of act of insolvency.*

If a trader shuts up his shop during business hours, or departs from his dwelling house, without leaving instructions where he is to be found if creditors call, or without making arrangements for carrying on his business, he must be presumed to have left to avoid his creditors ; but the absence may be satisfactorily accounted for and the presumption may be rebutted. Where in a petition to adjudicate him an insolvent the debtor has taken the attitude that there was no case to answer, he cannot be given a fresh opportunity to lead evidence to account for his absence and the Court can hold that the acts of insolvency had been established.

S. Srinivasaraghavan for Appellant.

T. Krishnaraja Naicker for Respondent.

K.S. *Appeal dismissed.*

Govinda Menon, J.
18th February, 1948.

Ganeshmal Sait, *In re.*
Cr. R. C. No. 869 of 1947.
(Cr. R. P. No. 759 of 1947).

Penal Code (XLV of 1860), *section* 384—*Extortion—Gist of offence—Intention of accused—Relevance.*

The chief element in the offence of extortion is " intentionally putting a person in fear of any injury to that person or to any other " and thereby *dishonestly* inducing the person so put in fear to deliver to any person any property or valuable security. It cannot be said that the accused by asking for the money which he had lost and which he believed to have been misappropriated by the complainant was trying to have any wrongful gain. In the absence of an intention on the part of the accused to cause wrongful loss an offence under section 384 of the Penal Code cannot be made out.

A. V. Narayanaswami Iyer for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. *Revision allowed.*

Happell and Govindarajachari, JJ.
18th February, 1948.

Vridhambal Ammal, *In re.*
R.T. No. 1 of 1948.

Criminal trial—Confession by accused that she threw away a new born baby in a field where she delivered it—Discovery of dead body of a new born child in a nearby well—If sufficient proof that the child was that of the accused.

Where according to the confessional statement of the accused she threw away her new born child and within 36 hours thereafter a dead body of a child was discovered in a well in that village (which was a small one) not far away from the place where the accused was delivered, it can be held that the child was that of the accused.

Emperor v. *Kuppammal,* 1940 M.W.N. 149 distinguished.

V. N. Jagannatha Rao for Accused.

P. Chandra Reddy for the Public Prosecutor on behalf of the Crown.

K.S. *Conviction and sentence under section* 318 *instead of section* 302 *of the Penal Code substituted.*

Govinda Menon, J.
18th February, 1948.

Mallesa and others, *In re.*
Cr.R.C. No. 836 of 1947.
(Cr.R.P. No. 727 of 1947).

Penal Code (XLV of 1860), *section* 447—*Case of trespass—Question of title—If and how far can be gone into by the Criminal Court.*

In a case of criminal trespass it cannot be said that it is not open to the Court to go into the fact of title at all. In order to ascertain the possession of the property a criminal Court is entitled to look into the documents of title and come to a tentative finding regarding the question of the title as well. Where the documents of title corroborate the evidence as to possession it is preferable to believe such testimony rather than that of witnesses who speak without such documentary support.

J. Krishnamurthy for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Petition dismissed.*

Govinda Menon, J.
20th February, 1948.

Kasi Rao *v.* Rajagopal Pillai.
Cr.R.C. No. 550 of 1947.
(Cr.R.P. No. 449 of 1947).

Penal Code (XLV of 1860), *section* 409—*Offence under—Prosecution—Proof required of—Criminal Procedure Code (V of* 1898), *sections* 435 *and* 436—*Scope of powers under.*

In a case under section 409 of the Indian Penal Code the prosecution must show not only the entrustment but also that the accused person has misappropriated that sum. It cannot be said that there is any onus cast upon the accused, an agent, to explain how the whole of the capital and the subsequent earnings disappeared.

Even though the powers of a revisional Court under sections 435 and 436 are very wide in setting aside an order of discharge such Court is not justified in treating the matter as if there was an appeal before it. It may be that on the evidence the trial Court came to a wrong conclusion in discharging the accused under section 203, Indian Penal Code but that by itself will not justify a revisional Court to deal with the matter as if it is an appeal and set aside the order of discharge.

N. Somasundaram and *P. Rajamanickam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

V. *Rajagopalachari*, *V. Seshadri* and *K. S. Ramamurthi* for Respondent.

K.S. ——— *Petition allowed.*

Govinda Menon, J.
25th February, 1948.

Srirangam Municipality *v.* Palaniswami Pillai.
Cr.R.C. No. 250 of 1947.
(Cr.R.P. No. 240 of 1947).

Madras District Municipalities Act (V of 1920), *section* 249—*Requirements of—New purposes added in schedule V—Fresh notification—Necessity.*

It cannot be said that merely publishing a notification stating that one or more of the purposes mentioned in schedule V of the District Municipalities Act cannot be carried on without a licence is tantamount to saying that such a publication should enure even if the purposes mentioned in the schedule have been increased by the addition of fresh purposes or decreased by the reduction of certain purposes mentioned therein. Section 249 makes it clear that such an omnibus publication of the then existing purposes at a particular time will not be sufficient compliance with the statute because the words used are "any one or more of the purposes specified in schedule V.". The scope of section 249 cannot be enlarged by putting a strained construction on the plain words of the section. The Municipality can at any particular time prohibit the use of any place within the area mentioned in section 249 for the carrying on of any one business or more than one business or all the businesses mentioned in schedule V. But publication of such notification will not suffice when fresh purposes are added in the schedule and a person cannot be prosecuted for failure to take out licences for new purposes included in the schedule.

V. Rajagopalachari for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K. Subba Rao and *K. Srinivsan* for Respondent.

K.S. ——— *Petition dimissed.*

Govinda Menon, J. Jayaram and others, *In re.*
24th February, 1948. Cr. R. C. No. 544 of 1947.
(Cr. R. P. No. 443 of 1947).

Criminal Procedure Code (V of 1898), *sections* 253, 435 *and* 436—*Order setting aside order of discharge against some of the accused where charges framed against others—Proper time for making in revision.*

The proper time at which the propriety of a discharge order (after examining prosecution witnesses on the first information report filed before him) can be agitated in revision is only after the Court of enquiry or trial has finally disposed of the matter. It would not be proper for a Magistrate discharging some accused and framing charges against others to express any definite opinion regarding the credibility or otherwise of the witnesses examined for the prosecution. Till the charge against the remaining accused is disposed of by a final order, the trial Court should be deemed to be in seisin of the whole case and so long as it is in charge thereof the reasons in regard to the order of discharge can be given at the final stage. There is nothing in the language of section 253, Criminal Procedure Code, which precludes the Court from doing so.

As a matter of practice and convenience, it would always be better if the applications by the prosecution for setting aside orders of discharge in cases where charges have been framed against some of the accused alone, or against all the accused under some sections alone, were made only after the Court finally disposes of the matter.

V. Rajagopalachari, *C. Deenadayalu* and *K. Raja* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S. ——— *Order set aside.*

Horwill, J. Kottulungal Muhammad *v.* Akkiraman Namboodri.
25th February, 1948. C. R. P. No. 767 of 1947.

Madras Tenants and Ryots Protection Act (XVII of 1946), *section* 4 (1) (*a*)—*Suit for redemption of Malabar mortgage described as " Kaivasam panayam "—If involves eviction of a tenant and liable to be stayed.*

A Malabar mortgage document was described as a usufructuary mortgage and in general its terms were those of a usufructuary mortgage. The document contained a passage " you may, therefore, hold the property in possession according to the custom of Muthal Kudima Nyayam" and some " purapad " (rent) was payable. In a suit for redemption, it was contended that it involved " eviction of a tenant " and must be stayed under section 4 (1) (*a*) of Madras Act XVII of 1946.

Held, on a consideration of the document in question that it was a usufructuary mortgage and not a lease and the suit did not fall within the mischief of section 4 (1) (*a*) of Madras Act XVII of 1946.

One will have to consider from a perusal of the deed itself whether its primary object is that the person put into possession should enjoy the land or whether it is primarily intended that the land should be security for the debt.

K. P. Ramakrishna Aiyar for Petititoner.

S. Venkatachala Sastri for Respondent.

K.S. ——— *Petition dismissed.*

Horwill, J., Raman Nambiar *v.* Govindan Nayar.
26th February, 1948. C.R.P. No. 1037 of 1947.

Madras Tenants and Ryots Protection Act (XVII of 1946), *section* (4) (1) (*a*)—*Suit to redeem othi—Othidar and his sub-kanomdars—If " tenants " entitled to ask for stay of suit.*

In a suit for redemption against the othidar, his sub-kanomdars claimed that they were "tenants" under the Malabar Tenancy Act and the suit must be stayed under section 4 (1) (*a*) of Madras Act XVII of 1946.

Held :—The suit othi was only an ordinary usufructuary mortgage and the othidar is not a tenant entitled to ask for stay nor is he a tenant as an "intermediary", within the meaning of section 3 (*j*) of the Malabar Tenancy Act. The sub-kanomdars cannot have any greater rights to continue in possession when the othidar had none.

D. H. Nambudripad for Petitioner.

K. P. Raman Menon for Respondent.

K.S. —————— *Petition dismissed.*

Horwill, J. Chinnappa Naidu *v.* Deenadayalu Naidu.

26th February, 1948. C.R.P. No. 944 of 1947.

Civil Procedure Code (*V of* 1908), *Order* 9, *rule* 9—*Application to set aside* ex parte *decree—Applicant absent as he was in jail on the adjourned date—Dismissal of application on his vakil reporting no instructions—Application to set aside such order of dismissal—If lies—Limitation—Limitation Act* (*IX of* 1908), *Article* 163—*Applicability—Time if can be extended.*

Pending a defendant's application to set aside an *ex parte* decree he was arrested and did not appear on the adjourned date. His vakil reported no instructions and his application was dismissed on 3rd February, 1945. He was released from jail on 17th October, 1946, and he filed an application on 28th October, 1946, to set aside the order of dismissal.

Held :—As the application was not filed within 30 days of the order of dismissal under Article 163 of the Limitation Act the Court has no jurisdiction to set aside the dismissal for default.. The Court has no inherent jurisdiction to extend the time and section 5 of the Limitation Act has no application. Order 9, rule 9, applies to voluntary as well as involuntary absences. The fact that the applicant was in jail does not affect the position.

R. Srinivasa Aiyangar for Petitioner.

T. R. Arunachalam and *R. Mathrubhutham* for Respondents.

K.S. —————— *Petition dismissed.*

Govinda Menon, J. Govindan, *In re.*

4th March, 1948. Crl.R.C. No. 269 of 1948.

(Cr.R.P. No. 252 of 1948).

Penal Code (*XLV of* 1860) *section* 147—*Act constituting offence under other sections also—Separate sentences under each section, if to be awarded.*

It is neither necessary nor desirable in a case where offences under separate sections of the Penal Code which are very much interrelated are committed, that separate sentences should be given under each of the sections. Where the ingredient of an offence under section 147 of the Penal Code is the act by which the offences under the other sections of the Penal Code are created a single sentence will be sufficient.

S. Venkatachala Sastri for Petitioner.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S. —————— *Sentence reduced.*

Govindarajachari and *Govinda Menon, JJ.*
3rd March, 1948.

Karmega Kone, *Appellant.*
R.T. No. 10 of 1948.
Cr. App. No. 57 of 1948.

Criminal Procedure Code (*V of* 1898), *section* 342—*Mode of examining accused—Failure to comply with section—Irregularity.*

It is the duty of the Court under section 342, Criminal Procedure Code, to be satisfied either by the statement of the accused or by his answers to questions or by both that he has an opportunity to explain the circumstances of the case. When an accused gives a final explanation in answer to a general question, the Court is not bound to put further questions by way of cross-examination. And an omission to strictly comply with section 342 of the Code cannot render a conviction liable to be set aside unless it has caused a failure of justice.

T. C. Raghavan for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

B.V.V. *Appeal dismissed.*

Rajamannar, O.C.J. and *Satyanarayana Rao, J.*
5th March, 1948.

The Coimbatore Transport, Ltd. *v.* The Governor-General in Council.
O.S.A. No. 70 of 1947.

Company—Winding up—Inability to pay tax—Levy of tax being disputed—Order in winding up—Whether need be postponed.

The appellant company having failed to pay the amount due in respect of of Income-tax, Super-tax and Excess Profits Tax was ordered to be wound up on an application presented by the Income-tax Department. It was shown that the company did not have enough assets to pay the taxes but it was contended for the appellant that the levy of the taxes was being contested.

Held, that the fact that there was a dispute as to the quantum of the tax was not a sufficient ground for not passing a winding up order, when it was otherwise clear that the company was unable to pay the taxes.

23 Ch.D. 210, 19 Eq. 444 and (1894) 2 Ch. 349, referred to.

V. Sriramamurthi for Appellant.

C. S. Rama Rao Saheb and *S. Swaminathan* for Respondent.

B.V.V. *Appeal dismissed.*

Govindarajachari, J.
8th March, 1948.

Satyanarayanamurthy v. Bulli Veeraju and others.
S.A. No. 2085 of 1945.

Contract—Novation—Agreement entered between some parties —Later agreement superseding prior one—Same entered into by parties to prior agreement and also others—Effect.

An agreement to which some alone are parties can be superseded or rescinded by a later agreement to which they and some others are parties.

Definition of novation in *Scarf* v. *Jardine*, (1887) 7 Appeal Cases 345 at 351, relied on.

P. Somasundaram for Appellant.

C. Rama Rao, V. Kameswara Rao and *M. S. Ramachandra Rao* for Respondents.

B.V.V. *Appeal dismissed.*

Rajamannar, O.C.J. and *Satyanarayana Rao, J.*
10th March, 1948.

Rangaswami Naidu *v.* Vummidi Bangaru Chetty & Sons and another.
C.M.P. No. 1342 of 1948.

Madras Buildings (*Lease and Rent Control*) *Act* (*XV of* 1946), *section* 7 (2)—*Conditions fulfilled—Rejection of application of landlord—Validity—Time for delivery of possession—Rent for period—Liability of tenant.*

There is nothing in section 7 (2) of the Madras Buildings (Lease and Rent Control) Act, which enables the Controller to reject the application of the landlord even when he is satisfied that one or more of the conditions laid down there in have

been fulfilled. No doubt the tenant is to be given a reasonable opportunity of showing cause against the application, but that can only be on grounds open to him in law.

When the Rent Controller has made an order directing the tenant to put the landlord in possession of the premises on a particular date, the tenant is liable to pay the rent as rent for the period before the date fixed for delivery of possession.

G. Ramakrishna Aiyar and *C. Loganatha Mudaliar* for Petitioner.

V. Radhakrishnayya for first Respondent.

B.V.V. *Application for* writ of certiorari *dismissed.*

Govinda Menon, J. Pedda Muni Reddi, *In re.*
11th March, 1948. Cr.R.C. No. 1278 of 1947.
(Cr.R.P. No. 1163 of 1947).

Penal Code (*XLV of* 1860), *section* 353—*Head constable having no written warrant trying to arrest a person on suspicion—Use of criminal force against—Not an offence under section* 353.

Where a head constable attempts to arrest a person on suspicion without the necessary warrant in writing required by section 56 (1) of the Criminal Procedure Code, the use of criminal force by the person suspected against the head constable will not amount to an offence under section 353 of the Penal Code. If the action of the public servant was not valid in law, using criminal force against him would not amount to an offence under section 353. Where the head constable did not purport to arrest on his own account it cannot be contended that an offence under section 353 was committed as the officer could arrest a person suspected of a cognisable offence without a warrant. In the circumstances even if a relation of the person sought to be arrested tries to prevent the arrest by using force or threatening to use force, such an act cannot come within the ambit of section 353 of the Penal Code.

27 Mad. 52; 41 Cr.L.J. 742, referred to.

T. M. Venugopala Mudaliar for Petitioners.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

K.S. *Conviction set aside.*

Rajamannar, O.C.J. Ramaswami Gupta *v.* Krishnayya.
12th March, 1948. C.R.P. No. 546 of 1948.

Court-Fees Act (*VII of* 1870), *section* 17—*Distinct subjects—Suit for specific performance of contract of sale—Alternative prayer for recovery of debt due by defendant—Court-fee payable.*

A promissory note executed by the defendant in favour of a third person was assigned by the latter to the plaintiff. Subsequently the defendant entered into an oral agreement of sale whereby he agreed to sell his house to the plaintiff for a certain amount, which sum had to be adjusted towards part of the amount due under the promissory note. The defendant, however, did not execute a proper sale-deed, though the plaintiff was willing to perform the contract. The plaintiff sought to obtain a decree granting specific performance of the contract of sale by calling upon the defendant to execute a sale of the property and directing the defendant to pay the balance of the amount due under the promissory note after adjustment of the consideration for the sale. He prayed in the alternative for a decree directing the defendant to pay the entire amount due under the promissory note, if it was found that the contract of sale was unenforceable.

Held, that the suit comprised two distinct subjects, and that the plaintiff was therefore bound to pay separate court-fee on each of the reliefs claimed by him under section 17 of the Court-Fees Act.

I.L.R. 54 Mad. 1 (F.B.); (1938) 1 M.L.J. 139; (1939) 1 M.L.J. 456 and (1942) 2 M.L.J. 418, considered.

M. V. Nagaramayya for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *Messrs. Raman* and *Raghavan* for Respondents.

B.V.V. *Petition dismissed.*

Horwill, J. Kalyanasundaram Chetty *v.* Nagalinga Achari and another.
12th March, 1948. C.C.C.A. No. 6 of 1947.

Decree—Construction—Joint or several decree—Suit by reversioner to avoid alienations —Alienations in favour of different parties set aside—Direction for payment of costs—Apportionment.

Where a suit is filed by a reversioner to avoid a number of alienations to different persons made by the limited owner, the plaintiff would, if successful, ordinarily recover from each individual alienee the possession of the particular item in his possession together with mesne profits on that item and the costs relating to that item. There is no duty cast on any individual defendant to ask at the stage of the passing of the decree that the costs of the plaintiff should be apportioned between them. Where in such a case the decree provided that "the plaintiffs are entitled to their costs . . . . . . in respect of items 1, 2, 6 and 7 as against the first, second, fifth and sixth defendants,"

Held, that the decree for costs was a several and not a joint decree.

V. Varadaraja Mudaliar and *A. M. Krishnaswami Mudaliar* for Appellant.

R. V. Seshagiri Rao for Respondents.

B.V.V. *Appeal dismissed.*

Govinda Menon, J. *In re* Doraiswamy Iyer.
12th March, 1948. Cr.M.P. No. 337 of 1948.

Government of India Act, 1935, *section* 270 (1)*—Applicability—Public servant—Offences of conspiracy and breach of trust—Acts not done in discharge of official duty—Previous sanction if necessary—Criminal Procedure Code* (*V of* 1898), *section* 197.

The petitioner, who was employed as an officer in the Transport Garrison Engineering Office was entrusted with the duty of allotting trucks to the various military departments for their use. The prosecution case was that the petitioner entered falsely in the duty slips some bogus military work and hired out the lorries to private contractors after receiving illegal gratification. This was done according to the prosecution as a result of conspiracy between the petitioner and the second accused, and they were charged for the offence of criminal conspiracy and for criminal breach of trust. The petitioner sought to have the prosecution quashed for the reason that the proceedings were illegal for want of sanction under section 270 (1) of the Government of India Act and section 197 of the Criminal Procedure Code.

Held, that the petitioner in doing the acts giving rise to the prosecution was not acting in the discharge of his official duties and that the provisions of section 270 of the Government of India Act and section 197 of the Criminal Procedure Code were inapplicable to the case.

(1939) 2 M.L.J. (Supp. 23) considered.

K. V. Ramaseshan and *R. Subramanyam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

B.V.V. *Petition dismissed.*

Govinda Menon, J. *In re* D. H. Satyam.
15th March, 1948. Cr.R.C. No. 332 of 1948.

Criminal Trial—Practice—Accused acquitted on Sunday—Validity—Criminal Rules of Practice, Rule (1)*—Effect.*

Though Rule (1) of the Criminal Rules of Practice states that no judicial work should be transacted on Sunday it does not mean that the Court has no jurisdiction to acquit an accused on Sunday and release him from custody.

G. N. Chari for Petitioner.

B.V.V. *Petition dismissed.*

Horwill and *Govindarajachari, JJ.* Meerasa Rowther, *Appellant.*
16*th March,* 1948. Cr.App. No. 679 of 1947.

Penal Code (XLV of 1860), *section* 302—*Sentence—Extenuating circumstance—Father killing his child to whom he was attached—Feeling of remorse—Whether can be taken into account.*

The fact that the accused murdered his own child to whom he was evidently attached is not an extenuating circumstance. On the other hand the murder of an innocent child must be considered as something graver even than the attack on a person against whom the accused had some spite. Nor is the fact that the accused showed remorse after he killed the child an extenuating circumstance.

G. Gopinath (amicus curiae) for accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

B.V.V. *Appeal dismissed.*

Horwill and *Govindarajachari, JJ.* Velayudhan Nair, *In re.*
16*th March,* 1948. R.T. No. 13 of 1948.
Cr.App. No. 31 of 1948.

Evidence—Accomplice's testimony—Admissibility—Offence of murder—Concealment of evidence—Evidence regarding—Value.

A person who assisted in concealing the evidence of murder is not an accomplice so far as the offence of murder was concerned and the disability attaching to the evidence of the accomplice will not attach itself to the witness who had committed an offence punishble only under section 201, Indian Penal Code.

I.L.R. 27 Mad. 271, followed.

40 C.W.N. 1164 (P.C.) considered.

M. K. Nambiar and *M. Sekhara Menon* for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

B.V.V. *Sentence modified.*

Happell and *Govindarajachari, JJ.* Antony D'Silva & others.
19*th March,* 1948. Cr.R.C. No. 1338 of 1947.

Criminal Procedure Code (V of 1898), *sections* 177, 178 *and* 179 *and section* 188 —*Effect—Native State subject committing crime in British India—Jurisdiction of British Indian Court—Court having jurisdiction regarding one charge—Effect.*

Section 177 of the Criminal Procedure Code is based on the English Law that all crime is local. In the case of an offence under section 420, Indian Penal Code, if the deception and the deprivation of the property both take place within the local limits of the jurisdiction of a Court, section 177 will directly apply. If, on the other hand, deception is practised within the territorial jurisdiction of one Court and the consequences, namely payment of money, occurs within the jurisdiction of another Court either Court can, because of section 179 of the Code, try the case subject to the applicability of the Code to both the Courts. Where an offence is committed at any place without and beyond the limits of British India by a Native Indian subject of His Majesty, Section 188 prescribes that the accused can be committed at any place in British India where he is found.

The mere fact that the Court has no jurisdiction or the requirement of the proviso to section 188 the Code has not been satisfied as regards one charge does not in any way exclude the jurisdiction of the Court to entertain another or other charges not similarly affected or render the prosecution under such charges illegal or irregular.

M. K. Nambiar and *M. Sekhara Menon* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

B.V.V. *Petition allowed.*

Horwill, J. Potru Subbiah *v.* Palaparthi Venkateswarlu.
13th February, 1948. S.A. Nos. 1026 and 1137 of 1946.

Hindu Law—Joint family—Alienee of specific item from coparcener—Right to be allotted that item in partition—Right of alienee from alienee—Different alienees from different coparceners—Working out of equity.

Where a Hindu coparcener purports to convey not merely his share of the property but the whole of a particular item belonging to the joint family, the vendee is not entitled to the alienor's share in the item conveyed. He has only an equitable right to sue for a general partition and to pray that if possible that particular item of property might be allotted to him in the partition, and if not, that he might be given some other property instead.

The relationship between an alienee from a member of a joint family and his alienee is that of a vendor and purchaser under the Transfer of Property Act and the remedy is under their contract to recover damages for breach of covenant of title.

If one coparcener alienates an item of family property and then another coparcener alienates the same item of property, the position of the alienee from the one is not stronger than the position of the alienee from the other. If there is any difference at all, equity favours the first alienee rather than the second who purchases the property with a knowledge of the equitable rights of the first alienee.

V. Subramaniam and *N. Subramanian* for Appellants.

K. Kameswara Rao for Respondents.

S.A. No. 1027 *of* 1946 *allowed.*
S.A. No. 1137 *of* 1946 *dismissed.*

B.V.V.

Govinda Menon, J. *In re,* Subramania Kandar.
17th March, 1948. Crl.R.C. Nos. 1158 and 1159 of 1947.

Criminal Trial—Practice—Criminal Revision Petition—Dismissal for default——Restoration—Permissibility.

A criminal revision petition which has been dismissed for default of appearance cannot be restored to file. There is no provision in the Criminal Procedure Code analogous to Order 9, rule 13 of the Civil Procedure Code.

K. Veerasami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

R. Desikan for Respondent.

B.V.V. *Petition dismissed*

Horwill and Govindarajachari, JJ. Gnanambal and another *v.* Meenambal Sundaram and others.
18th March, 1948. O.S.A. No. 59 of 1947.

Madras High Court Original Side Rules, Order 45, *Rule* 1—*Power of executor to sell property at any time—Application to Court by originating summons for sale—Maintainability.*

Where after providing for several contingencies the testator provided that if the joint ownership and enjoyment became impossible his executor or executors should cause the house to be sold,

Held, that the executor who had the power to sell was entitled to apply by originating summons for a sale of the house, and the Court could order the sale after up-holding the applicant's right to sell the property.

A.V. Viswanatha Sastri, C.A. Mohammad Ebrahim and T.S. Santhanam for Appellants.

B. Jagannadha Das, S. Suryaprakasam, N. Rajeswara Rao and *C.V. Dikshitulu* for Respondents.

B.V.V. *Appeal dismissed.*

NRC

The Officiating Chief Justice and *Satyanarayana Rao, J.* Abdul Shukoor *v.*
18th March, 1948. The Official Assignee, Madras & others
O.S.A. No. 40 of 1946.

Presidency Towns Insolvency Act (III of 1909), *section* 7—*Sale by Official Assignee outside insolvency—Directions given by Court by consent of parties—Application for further directions—Maintainability—Claim of purchaser to enforce specific performance barred—Effect.*

Section 7 of the Presidency Towns Insolvency Act would not apply to matters totally unrelated to the administration of the estate of the insolvent and distribution of his assets among the creditors. But where the sale of the insolvent's property was made outside the insolvency but an application was made to the Court regarding the sale and a consent order was made,

Held, that the Official Assignee was entitled to apply for directions from the Court regarding the execution of the conveyance in favour of the purchaser.

Held, further, that the Official Assignee was entitled to apply for such directions notwithstanding the fact that the claim of the purchaser to enforce specific performance of the agreement of sale in his favour was time barred and consequently unenforceable.

A. V. Viswanatha Sastri for Appellant.

M. S. Venkatarama Aiyar, A. Sundaram and *V. Natesan* for Respondents.

B.V.V. *Appeal dismissed.*

Subba Rao, J. Kandaswami Udayan *v.* Annamalai Pillai and others
21st March, 1948. C.R.P. No. 315 of 1947.

Court-Fees Act (VII of 1870 *as amended), section* 7 (iv-A) *and* (v)—*Alienation by limited owner or manager—Suit for recovery of possession ignoring sale—Court-fee payable—Election to treat alienation as nullity.*

An alienation by a limited owner or a manager of a Hindu family is not absolutely void but is *prima facie* voidable at the election of the reversionary heir or the other members of the family. They can elect to treat it as a nullity without the intervention of the Court and the commencement of an action to require possession of the property may amount to such election. And they are not bound to ask for cancellation of the sale deed or for a declaration but can claim the relief of possession of the property covered by the sale deed.

I.L.R. 1940 Mad. 259 (F.B.) and (1946) 2 M.L.J. 459 referred to.

N. Sivaramakrishna Aiyar for Petitioner.

D. Ramaswami Aiyangar for Respondents.

B.V.V. *Petition dismissed.*

Horwill and *Govindarajachari, JJ.* *In re* Venktachala Thevar.
25th March, 1948. Cr.M.P. No. 439 of 1948.

Madras Maintenance of Public Order (1947), *sections* 1 *and* 3 (1)—*Person kept in custody—Duty of Government to disclose reasons for detention—Criminal Procedure Code (V of* 1898), *section* 491.

Under section 3 (1) of the Madras Maintenance of Public Order Act, 1947, the Provincial Government is bound to inform the detinue of the grounds for his detention but the grounds need not be given "forthwith". In the absence of any mention of a period within which the grounds should be given, it must be understood that they should be furnished within a reasonable time.

K. Bashyam and *S. Gopalaratnam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

B.V.V. *Petition dismissed.*

Happell, J. The Commissioner, Municipal Council, Vizagapatam *v.* Siddeswara Devi.

17th March, 1948. S.A. No. 2049 of 1946.

Madras District Municipalities Act (*V of* 1920), *section* 354—*Jurisdiction of Civil Court—When arises—Mere mistake of fact—Whether sufficient.*

The question whether the jurisdiction of a Civil Court is ousted by virtue of section 354 of the Madras District Municipalities Act will depend on the facts of each case. The assumption of jurisdiction by the Civil Court will involve something more than a mistake of fact by the Municipal authorities.

I.L.R. 2 Mad 37 ; I.L.R. 21 Mad. 5 ; I.L.R. 24 Mad. 205 and I.L.R. 27 Mad. 547 referred to.

K. Kuttikrishna Menon for Appellant.

H. Prabhakara Rao for Respondents.

B.V.V. *Appeal dismissed.*

Happell, J. Arjuna Goundan *v.* Jayakeerthi Nainar.

19th March, 1948. A.A.O. No. 75 of 1947.

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 10—*Parties to suit—Suit regarding rights in irrigation channel—Government being paramount owner of channel—Need for being impleaded as party.*

The suit was filed on behalf of the representatives of a village for a declaration that they were entitled to take water by means of a sluice at a certain point from a supply channel before it reached the tank which it supplied and which belonged to villagers of another village. It appeared that the Government was the paramount owner of the channel in question.

Held, that the Government was a necessary party to the suit as there could be no complete and effective adjudication of the rights of plaintiffs except in the presence of the Government.

34 M.L.J. 425 ; 33 L.W. 681 and 66 M.L.J. 290 considered.

V. V. Raghavan for Appellant.

T. K. Sundarachari for Respondent.

B.V.V. *Appeal dismissed.*

Panchapagesa Sastry, J. Pavangat Raghavan *v.* Manya Kutti

23rd March, 1948. C.R.P. No. 766 of 1947.

Deed—Construction—Panayam kychit—Provision for sale in case of non-payment of pattom—Relationship of landlord and tenant—Anomalous or usufructuary mortgage whether constituted.

Where the document was described as a panayam kychit but the various clauses provided more for the enjoyment of the lands for cultivation purposes in the first instance for two years on a fixed pattom, and thereafter on payment of the pattom as before, and there was no other contemporaneous mortgage deed executed between the parties but the kychit provided for sale of the right in property in case of non-payment of the pattom,

Held, that the deed merely created the relationship of landlord and tenant between the parties and that the document was not a usufructuary or anomalous mortgage.

K. P. Ramakrishna Aiyar for Petitioner.

D. A. Krishna Variar for Respondent.

B.V.V. *Petition allowed.*

The Officiating Chief Justice and *Satyanarayana Rao, J.* 23*rd March,* 1948.

Kannabhiran Mudaliar *v.* Mullangi Lakshmana Perumal Chetty. L.P.A. Nos. 29 and 30 of 1947.

Madras House Rent Control Act (XV of 1946), *sections* 9 *and* 18 (1)—*Words "subject to provisions of Act" and "as the case may be"—Effect—Execution proceeding pending when Act came into force—Continuance.*

The words "subject to the provisions of the Act" which occur in Madras Act XV of 1946 cannot mean that an order validly obtained under the provisions of the Madras House Rent Control Order, 1945, could be attacked retrospectively in proceedings taken to execute such an order. It is only the further continuance of the proceedings pending on the date of the commencement of the Act that the provisions of the Act would govern. Nor is there anything in the words "so far as may be" to prevent the execution proceedings from being continued. Where on the date when Madras Act XV of 1946 came into force there was a valid execution application pending before the Principal Judge of the Madras City Civil Court to execute the order for eviction,

Held, that the execution proceeding was a proceeding which was pending under section 9 of the Act and that it could be continued after the passing of the Act.

Ch. Raghava Rao and *P. S. Kothandapani* for Appellant.

C. S. Varadachari for Respondent.

B.V.V. ——— *Appeal dismissed.*

The Officiating Chief Jusice and *Satyanarayana, Rao J.* 23*rd March,* 1948.

Gopalan *v.* The Travancore National & Quilon Bank Ltd., (in Liquidation). L.P.A. No. 17 of 1947.

Limitation Act (IX of 1908), *Article* 182 (5)—*Execution proceeding taken under order modifying decree—Fresh application to execute original decree—Saving of limitation.*

Where execution proceedings are taken to recover an amount due under a decree which had been varied or modified the execution petition filed to recover a higher amount payable under the original decree would nevertheless be an application in accordance with law so as to save limitation.

T. R. Venkataraman for Appellant.

Messrs. John and *Row* for Respondents.

B.V.V. ——— *Appeal dismissed.*

The Officiating Chief Justice and *Yahya Ali, J.* 1*st April,* 1948.

Ramachandra Rao *v.* Narayana Rao. C.M.P. No. 1988 of 1948.

Civil Procedure Code (V of 1908), *section* 110—*Leave to appeal to Federal Court—Question of law—Admissibility of document in evidence.*

It cannot be said that whenever a question as to the admissibility of any document is raised in an appeal and that question is decided in one way, that *ipso facto* there is a substantial question of law which would justify the grant of a certificate under section 110, Civil Procedure Code.

K. Bashyam and *T. R. Srinivasan* for Petitioner.

T. V. Muthukrishna Aiyar and *N. R. Govindachari* for *N. Karpakavinayakam* for Respondent.

B.V.V. ——— *Petition dismissed.*

Govindarajachari, J.
1st April, 1948.

Nadimpalli Chandrakantam *v.* Chandramouliswara Prasada Rao.
A.A.O. No. 10 of 1947.

Limitation Act (IX of 1908), *Article* 182—*Decree awarding mesne profits—Application for ascertainment—Starting point of limitation—Civil Procedure Code (V of* 1908), *Order* 20, *rule* 12.

The proper way of dealing with a decree which directs the ascertainment of mesne profits in execution is to treat it as a decree declaring the plaintiff's right to mesne profits coupled with a direction that the mesne profits may subsequently be ascertained in an application to be filed for that purpose. If the decree directs that the application should be one in execution it is an unnecessary and incorrect addition and cannot be given effect to. In such cases the question of limitation must be viewed on the footing that the application is one properly filed under Order 20, rule 12 of the Code.

P. Satyanarayana Raju and *M. B. Rama Sarma* for Appellant.

K. Kotayya for Respondent.

B.V.V. *Appeal dismissed.*

The Officiating Chief Justice and *Yahya Ali, J.*
1st April, 1948.

Venugopala Pillai *v.* Thirunavukkarasu and others.
O.S.A. No. 67 of 1947.

Lease—Agricultural lease—Lease of cocoanut trees for toddy tapping—Right to enjoy land not leased—Interest in immoveable property whether conveyed—Right of lessee—Termination of lease—Reasonable notice.

A document provided as follows : " I have agreed with you that I will act in accordance with the undermentioned, conditions for the sake of my enjoying for a period of three years the produce only of the cocoanut trees situate in the cocoanut garden. . . . . I shall have the trees in the said garden marked and enjoy the toddy yield. For enjoying the usufruct of the trees leased I shall pay a monthly rent of Rs. 150 every month. I shall have nothing to do with the leaves, the fibrous webs, etc. falling from the trees. You shall yourself at your cost bale water etc. for the trees in the garden and keep the same in good condition. You shall yourself do all the acts of bettering and improving the vacant land in the garden . . . . "

Held, that under the deed the defendant obtained the right to enjoy the toddy yield from the trees and the right to enter upon the land for the said purpose, and that he did not obtain any right in the land.

Held, further, that the right to tap the cocoanut trees and obtain toddy was in the nature of immoveable property, and that a sufficiently reasonable notice should be given before it could be properly terminated.

Marshall v. *Green,* (1875) L.R. 1 C.P.D. 35 ; I.L.R. 20 Mad. 58 ; I.L.R. 38 Mad. 833 and A.I.R. 1933 All. 50 considered.

K. V. Ramachandra Aiyar and *S. Thiagaraja Aiyar* for Appellant.

K. Narasimha Aiyar, Messrs. Subrahmanyam and *Rajagopal* for Respondents.

B.V.V. *Appeal allowed.*

Satyanarayana Rao, J.
2nd April, 1948.

Mohamed Ibrahim *v.* Shaik Mahomed Marakayar.
C.R.P. No. 1420 of 1947.

Civil Procedure Code (V of 1908), *Order* 32, *rule* 15—*Adjudication of person as being of unsound mind—Examination of party by expert—Power of Court to direct.*

Under Order 32, rule 15, Civil Procedure Code, the Court has the right and jurisdiction to enquire into the question, in a case where a person was not already adjudged to be of unsound mind, whether that person was really of unsound mind

or not. And in such a case the Court is perfectly justified in seeking the assistance of experts, and in directing that the plaintiff should submit to an examination by an expert.

Lee v. *Ryder*, 56 E.R. 1103, *Howell* v. *Lewis*, 65 L.T. 672; *Beall* v. *Smith*, 9 Ch. 85 and *Richmond* v. *Richmond*, 111 L.T. 273 referred to.

Messrs. B. Pocker and *Mahboob Alikhan* for Petitioner.

S. Ramachandra Aiyar and *M. Krishna Bharathi* for Respondents.

B.V.V. —— *Petition dismissed.*

The Officiating Chief Justice and *Rajagoplan, J.*
5th April, 1948.

Subramanian *v.* Seetharama Iyer
L.P.A. Nos. 13 and 14 of 1948.

Civil Procedure Code (*V of* 1908), *Order* 39, *Rules* 1 *and* 2—*Compromise decree in suit for partition—Execution of decree—Application for injunction to restrain—Maintainablity—Inherent power of High Court.*

Where a compromise decree was passed in a suit for partition and the decree-holder having taken out proceedings in execution, the judgment-debtor preferred an application for the issue of an interim injunction restraining the decree-holder from excuting the decree for possession,

Held, that the decree-holder could not be said to be committing any legal injury by executing his decree and that the application did not come within Order 39, rules 1 or 2 Civil Procedure Code.

Held further, that the extraordinary jurisdiction possessed by the High Court to issue an injunction apart from the Code could not be exercised by the subordinate Court or by the High Court sitting as an appellate Court against the orders of the Subordinate Court.

24 L.W. 421; 27 L.W. 418, and 35 L.W. 168, considered.

M. Appa Rao and *B. Srinivasamurthi* for Appellants.

V. Ramaswami Aiyar for Respondents.

B.V.V. —— *Appeals dismissed.*

Horwill and Mack, JJ.
6th April, 1948.

Krishnaswami *v.* Rex.
Cr.App. No. 42 of 1948.

Penal Code (*XLV of* 1860), *section* 302—*Murder of brother—Accused feeling ashamed of thefts committed by his brother—Admission of guilt—Action under section* 10-A, *Madras Borstal Schools Act.*

The accused who was 17 years old was convicted and sentenced for the offence of the murder of his brother. The evidence showed that the accused had been taking to heart the tendency of his brother to commit petty thefts, and when taxed with the offence after he stabbed his brother he admitted that he had committed the offence because he was ashamed of his brother's conduct. The accused was sentenced to transportation for life.

Held, that it was a proper case in which the accused should be dealt with under section 10-A of the Madras Borstal Schools Act.

N. Somasundaram for Apepllant.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

B.V.V. —— *Conviction confirmed.*

Govinda Menon, J.
8th April, 1948.

Narasingamuthu Chettiar, *In re.*
Crl.R.C. No. 1215 of 1946, and
Crl. R. C. No. 1021 of 1947.

Madras General Sales Tax Act (*IX of* 1939), *section* 15—*Offence under—Burden of proof—Adducing* prima facie *evidence—Shifting of onus—Proceeding quasi-criminal.*

When a criminal Court is approached by the revenue, local or public authorities for the enforcement of penalty for non-payment of a tax or tithe, the proceedings are not purely of a criminal nature but one quasi-criminal and in those cases the counter-petitioner is entitled to give evidence. Thus in respect of a prosecution under the Madras General Sales Tax Act for failing to submit the 'A' return, though it is incumbent on the prosecution to prove affirmatively that the offence was committed, it would be sufficient to shift the onus to the assessee if *prima facie* proof of the liability of such assessee has been furnished by the prosecution. In such cases there should not be the same rigidity and rigour in the matter of onus of proof on the prosecution as in the case of a prosecution for an offence under the Penal Code.

(1937) 1 M.L.J. 274; (1946) 2 M.L.J. 461; (1947) 1 M.L.J. 317 and *Attorney General* v. *Radloff*, 156 E.R. 366, referred to.

R. Ramamurthi Aiyar for Petitioner.

V. K. Thrivenkatachari (Special Public Prosecutor) for the Crown.

B.V.V. ——— *Sentence modified.*

Govinda Menon, J. Sriramamurthi, *In re.*
15*th April*, 1948. Crl.R.C. No. 136 of 1948.

Penal Code (*XLV of* 1860), *sections* 379 *and* 380—*Theft from person travelling in Railway train—Nature of offence—Railway compartment whether a building, tent or vessel.*

The accused was charged and convicted for an offence under section 380, Indian Penal Code for having stolen the property of a person sleeping in a running Railway train.

Held in revision that in asmuch as a railway compartment was not a building, tent or vessel used as a human dwelling or used for the custody of property, the conviction under Section 380 was illegal, and that the accused could be convicted only under Section 379, Indian Penal Code.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

B.V.V. ——— *Sentence modified.*

Govinda Menon, J. Devata Kamaraju *v.* Somaraju and another.
20*th April*, 1948. Cr.M.P. No. 329 of 1948.

Criminal Trial—Transfer of case—Grounds—Magistrate ordering arrest of complainant—Reasonable apprehension.

Where the Magistrate issues a warrant for the arrest of the complainant in a case, where the absence of the complainant will entitle him to dismiss the case or discharge the accused, the complainant can have a resonable apprehension in his mind, which even though not well founded, will none the less be a good ground for asking for transfer of the case.

R. Santanam (Amicus curiae) for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

B.V.V. ——— *Petition allowed.*

[END OF VOLUME, 1948—I.]

MR. JUSTICE CHANDRASEKHARA IYER'S REPLY.

Thanking the Advocate-General for the generous terms in which he had referred to him, Mr. Chandrasekhara Iyer said :

"It is a matter of much satisfaction to me to learn that my work as a Judge, such as it has been, has met with approval at the hands of such an intellectual and critical body as the members of the Madras Bar. Everyone of you extended to me in full measure your help and co-operation in the discharge of my duties and such success as has been given to me to achieve is due to this generous assistance for which I feel really grateful. During the six and odd years I have been with you as a Judge of this High Court, I always felt that I have been in the midst of an intimate circle of friends who were prepared to overlook my shortcomings and magnify my virtues. You, Mr. Advocate-General, have alluded to my activities outside the Court in fields not strictly pertaining to law. May I say that while it is perfectly true that a Judge must confine himself mainly to his judicial world and should not get himself mixed up with controversial affairs political, economic or social, it is my conviction that he would be failing in his obligations to the exalted position he holds in society if at the same time he does not devote himself to the service of causes and measures calculated to promote public good and on which there could be no real difference of opinion.

Before I bid you [illegible] "farewell," I desire to state that I associate myself unreser[illegible] every sentiment expressed by Sir Frederick Gentle and Mr. Justice Rajamannar, our Officiating Chief Justice, on the need for maintaining unimpaired the great traditions of this High Court for efficiency, impartiality and independence. In this connection, I would beg you, my brethren, to think of recruitment to the High Court Bench not in terms of sectional, class, credal or regional representation, but only from the standpoint of securing absolutely the best men available whether they are to be found in the ranks of the Bar, or the subordinate judicial service, and whether they are Telugus or Tamils, Brahmins or non-Brahmins, Muslims or Christians. Much of the stability of the Government depends on the existence of a competent and fearless judiciary inspiring confidence in the minds of the public by the soundness of their conclusions and in their freedom from prejudice or bias. Men of true culture, high character and lofty attainments must man the highest courts in the land, for it is only then that standards will be set up and examples furnished which would elevate and purify not merely the legal atmosphere in Courts of law and justice, but also the general level of society in the much wider sphere around.

Let me conclude by tendering thanks once again to you, Mr. Advocate-General and the members of the Bar on whose behalf you have spoken. Let me wish all of you collectively, and every one of you individually, happiness and prosperity. As I shall be remaining largely in Madras even after my retirement there will be many opportunities of our meeting one another and exchanging ideas or comparing notes. I count among you many personal friends and I have no doubt that you will all extend to me in the future as in the past, your trust, goodwill and co-operation. I must also express my indebtedness to the staff of the High Court for all the help they have given me right through".

SUMMARY OF ENGLISH CASES.

RICHES *v.* WESTMINSTER BANK, LTD., (1947) A. C. 390 (H.L.).

Income-tax—Interest included in amount decreed in action for recovery of debt—Tax on—If can be deducted by debtor while paying the decree amount.

A sum of money awarded under the powers conferred by section 3 (*i*) of the Law Reform (Miscellaneous Provisions) Act, 1934, as interest, and included in the total sum for which judgment is given, is "interest of money" within the meaning of Schedule D to the Income-tax Act, 1918.

The debtor when paying the judgment debt is entitled to deduct income-tax on the amount of the award of interest and the decree-holder "must allow such deduction" upon receipt of the balance while the debtor will retain what is deducted and account to the Revenue.

Observations of Wright, J., in (1899) 2 Ch. 629 (651), dissented from.

(1945) Ch. 381, affirmed.

BRANCA *v.* COBARRO, (1947) 1 K.B. 854 (C.A.).

Sale of land—Agreement for—"Provisional agreement until fully legalised agreement drawn up"—How far binding.

An agreement for sale of land containing a clause "This is a provisional agreement until a fully legalised agreement is drawn up by a solicitor and embodying all the conditions herewith stated is signed" remains effective and binding until the legalised document was drawn up and signed. "Provisional" cannot mean "tentative".

LIVERPOOL AND LONDON WAR RISKS INSURANCE ASSOCIATION, LTD. *v.* OCEAN STEAMSHIP CO., LTD., (1947) 2 All.E.R. 586 (H.L.).

Insurance—War risks—Ship carrying war material—Damage caused to cargo by heavy seas aggravated by speed of ship—If covered by "risks due to warlike operations".

A vessel in wartime sailing from one war base to another with a cargo of war stores is engaged on a warlike operation. But it cannot be said generally that every loss which occurs on such voyage is to be treated as a war loss. Where damage was caused solely by heavy seas sweeping over the vessel and there was no complicating circumstance which could be classed as a war risk contributing to the damage within that area, the damage must be considered purely sea damage and the loss should not fall on the war risk policy.

GOTT *v.* MEASURES, (1947) 2 All.E.R. 609 (K.B.D.).

Tort—Killing of dog chasing game or other animals—When unlawful—Liability.

A person may be justified in shooting a dog if he honestly believes that it is necessary as being the only way in which he can protect his property. For example, if a farmer finds a dog chasing his sheep which may result in incalculable damage, and the only way in which he can protect his flock is by shooting the dog, he would be justified in doing so, But neither a person merely having sporting rights nor the owner of the land has any property in the wild game until he had reduced it into possession and such a person could not reasonably believe that he was entitled to shoot a dog chasing such wild game in protection of his property as he has no property to protect.

BREED *v.* BRITISH DRUG HOUSE, LTD., (1947) 2 All.E.R. 613 (K.B.D.).

Drugs—Manufacturing chemist supplying pills which contained only 75 *per cent. of drug ordered—Liability—Food and Drugs Act,* 1938, *section* 3 (1).

If a manufacturing chemist knows through his experience of manufacture, that certain pills will be or may be deficient in the quantity of the drug ordered, he should inform the doctor or the customer of the fact. Otherwise he will be liable for having supplied a drug deficient in quality and potency. The sale of such pills will be one to the prejudice of the purchaser for which the chemist can be charged under the Food and Drugs Act, 1938.

SUMMARY OF ENGLISH CASES.

Goss *v.* Goss, (1947) 2 All.E.R. 617.

Husband and wife—Divorce—Evidence of non-access by husband—Admissibility to rebut allegation of condonation of adultery.

Evidence of a husband denying intercourse when conception could have taken place is admissible to rebut an allegation of condonation of the wife's adultery or of cruelty which if directed solely to the question of adultery would have been inadmissible under the rule in *Russell* v. *Russell*, 1924 A.C. 687, as tending to bastardise the issue.

R *v.* Higgins, (1947) 2 All.E.R. 619 (C.C.A.).

Inn-keeper—When entitled to refuse to supply refreshments to traveller.

An inn-keeper is bound to supply a traveller with food and lodging which he cannot refuse without reasonable excuse. What is reasonable excuse is a question for the jury to decide on a consideration of all the circumstances of the case.

It cannot be said as a matter of law that an inn-keeper is not entitled to refuse to allow the whole of his provisions in the inn to be consumed at what is usually called luncheon time, or that he is doing anything wrong if he keeps provisions for those he may reasonably expect in the evening or for the requirements of himself and his family. There cannot as a matter of law be anything wrong, in an inn-keeper saying that he will serve people who have booked tables and will not serve any body else, even if he has food in his house, unless on a full consideration of all the facts the jury thinks such a refusal is unreasonable. (1902) 1 K.B. 696, explained.

Hale *v.* Hants and Dorset Motor Services, Ltd., (1947) 2 All.E.R. 628 (C.A.)

Highway authority—Planting trees on road side—Injury to passenger in omnibus from overhanging branches—Liability of highway authority.

Where passengers in an omnibus are injured by overhanging branches of trees, planted on the side of the highway, the highway authority is liable. There was nothing unreasonable in the driver driving as close to the kerb as he liked.

Hutton *v.* Watling, (1947) 2 All.E.R. 641 (Ch.D.).

Contract—Option to purchase land without mentioning any time limit for exercise—Enforceability—If affected by rule against perpetuities.

The rule against perpetuities affords no bar to the relief by way of specific performance where the plaintiff claims to exercise an option to purchase land even though no time limit was fixed for its exercise. The option is enforeceable by the grantee against the original grantor or as a matter of personal contract.

Commercial Structures Ltd. *v.* Briggs, 1947 2. All.E.R. 659 (K.B.D).

Income tax Act (1918) *section* 125 (1)*—Additional assessment if surveyor "discovers" underassessment or omission of property—"Discovery" that error of law had been committed —Reassessment.*

It is not stretching the word "discovers" in section 125 (1) of the Income Tax Act to hold that it covers the finding that an error of law has been committed in the first assessment, when it is desired to correct that by additional assessment.

(1934) I.K.B. 524, Followed.

(1932) I.K.B. 271, Not followed.

MORGAN *v.* MANSER, (1947) 2 All.E.R. 666 (K.B.D).

Contract—Plantiff contracting to act as manager of defendant, a variety artiste, for ten years—Defendant called up for army service—Frustration of contract.

A contract by the plaintiff to act as the manager of the defendant, a variety artiste, for a period of ten years becomes frustrated by the artiste being called up for army service and the plaintiff is not entitled to claim damages for breach of contract.

CRESSWELL *v.* SIRL, (1947) 2 All.E.R. 730 (C.A.).

Tort—Shooting of another's dog to prevent its attacking cattle or sheep—When justified.

Chasing by dogs which cause any real and present danger of serious harm to the animals chased constitute an "attack" which entitles the owners of the animals to make effective measures of prevention. The onus of proof (where the owner of the dog killed by the owner of the animals sues for damages) is on the defendant to justify the preventive measure of shooting the attacking dog. He must prove that at the time of shooting, the dog was either (*a*) actually attacking the animals in question or (*b*) if left at large would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented. He has to establish that either (*a*) there was in fact, no practicable means other than shooting, of stopping the present attack or preventing such renewal or (*b*) that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack.

NELSON AND OTHERS *v.* LARHOLT, (1947) 2 All.E.R. 751 (K.B.D.).

Trust—Executor issuing cheque from executor's account—Payee taking it for value and good faith—Liability to pay true owner—Notice of want of authority—What constitutes.

P, one of two executors had proved a will and obtained a grant of administration in England while the other *S* was absent in Australia. Power was reserved to *S* to come in later. *P* opened an executor's account in a Bank and the moneys of the estate were transferred to it. *P* drew a number of cheques on that account in favour of *L* a book-maker. *P* signed them "*P* executor of *W* (the testator)". *P* received cash for the cheques but could not say what he did with it. It was found that *P* was acting fraudulently and used the money for his own purposes. In an action by *S* and the beneficiaries against *L* to recover the moneys.

Held, *L* was bound to restore the amount unless he can show that he received the cheques in good faith and for value and without notice of the want of authority. As the defendant had notice of the want of authority he is liable although he acted in good faith and for value.

As to notice, if the defendant knew or ought to have known of the want of authority, as for instance, if the circumstances were such as to put a reasonable man on enquiry and he made none, or if he was put off by an answer that would not have satisfied a reasonable man, if he was negligent in not perceiving the want of authority, then he is taken to have notice of it.

SOTHEBY *v.* GRUNDY, (1947) 2 All.E.R. 761 (K.B.D.).

Landlord and tenant—Covenant for repairs by tenant—Inherent defects in foundation making building dangerous necessitating its demolition—Tenant if liable for costs of demolition.

Where premises demised had insecure foundations rendering it dangerous and necessitating its demolition, the expenses will not come within the terms of the tenants covenant for repair and the landlord is not entitled to recover them from the tenant.